# UNITED STATES REPORTS

## VOLUME 372

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1962

FEBRUARY 18 THROUGH APRIL 26, 1963

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WALTER WYATT
REPORTER OF DECISIONS

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DEPOSITED BY THE
UNITED STATES OF AMERICA

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

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ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

## SUPREME COURT OF THE UNITED STATES.

### ALLOTMENT OF JUSTICES.

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ARTHUR J. GOLDBERG, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 15, 1962.

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(For next previous allotment, see 370 U. S., p. IV.)

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1962.

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## NEW JERSEY ET AL. *v.* NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 104. Argued December 11, 1962.—Decided February 18, 1963.

Appellee railroad operates trains solely within the State of New Jersey; but it estimates that nearly 90% of its passengers travel to and from New York City via connecting buses owned and operated by a corporation unaffiliated but under contract with appellee. After discontinuing most of its passenger trains with the permission of the Public Utilities Commission of New Jersey, appellee filed with the Interstate Commerce Commission notice of its intention to discontinue all passenger service. On motion of appellants, the Interstate Commerce Commission dismissed the notice for want of jurisdiction. *Held:* The proceeding involved only trains "operated wholly within the boundaries of a single State," within the meaning of § 13a (2) of the Interstate Commerce Act, and it was properly dismissed for want of initial jurisdiction in the Interstate Commerce Commission. Pp. 2–9.

200 F. Supp. 860, reversed.

*William Gural,* Deputy Attorney General of New Jersey, argued the cause for appellants. With him on the briefs was *Arthur J. Sills,* Attorney General.

*Vincent P. Biunno* argued the cause for appellee. With him on the brief was *Charles H. Hoens, Jr.*

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*Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel, Robert W. Ginnane* and *H. Neil Garson* filed a brief for the United States and the Interstate Commerce Commission, urging reversal.

Briefs of *amici curiae*, urging reversal, were filed by *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for Railway Labor Executives' Association, and by *Austin L. Roberts, Jr.* for National Association of Railroad and Utilities Commissioners.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This direct appeal from a three-judge District Court involves the jurisdiction of the Interstate Commerce Commission to permit discontinuance of trains operated by the appellee railroad wholly within the State of New Jersey. At issue is whether the discontinuance procedures of § 13a (1) or § 13a (2) of the Interstate Commerce Act (72 Stat. 571–572, 49 U. S. C. §§ 13a (1), 13a (2)) are to be followed.

Appellee, New York, Susquehanna & Western Railroad Co., operates passenger trains between Butler, New Jersey, and Susquehanna Transfer, in North Bergen, New Jersey. Connecting buses, carrying only train passengers, run between North Bergen and the Port of New York Authority Bus Terminal in Manhattan. The buses are owned and operated by Public Service Coordinated Transport, a New Jersey corporation unaffiliated but under contract with appellee. According to appellee, nearly 90% of its passengers travel to and from New York.

As recently as 1956, appellee operated 30 passenger trains eastbound and 30 westbound on weekdays and 17 or 18 in each direction on weekends. Because of financial difficulties and continued losses on passenger train

operations, appellee has, with the permission of the Public Utilities Commission of New Jersey, reduced the number of trains from time to time so that it now operates only three trains in each direction on weekdays and none on weekends. The last reduction was authorized on July 14, 1960.

On December 30, 1960, appellee filed a notice with the Interstate Commerce Commission stating that it would discontinue all passenger train service on January 30, 1961. On January 9, 1961, appellants petitioned the Interstate Commerce Commission to dismiss the case without prejudice. Since appellee operated trains solely in New Jersey, appellants argued that the case was not, in the first instance, within the jurisdiction of the Commission. The Commission agreed and, on January 18, dismissed the notice for want of jurisdiction. Appellee then brought this suit in the United States District Court for the District of New Jersey to challenge the dismissal. A three-judge court was designated in accordance with 28 U. S. C. §§ 2321–2325 and 2284. The court, one judge dissenting, set aside the Commission's order. 200 F. Supp. 860. New Jersey appealed directly to this Court under 28 U. S. C. § 1253, and we noted probable jurisdiction. 370 U. S. 933.

The question presented is whether the procedure for discontinuing trains set forth in § 13a (1) of the Interstate Commerce Act is available to the appellee railroad as the court below held, or whether it must follow that set forth in § 13a (2) of the Act. Section 13a (1) relates to "the discontinuance . . . of the operation or service of any train or ferry operating from a point in one State to a point in any other State." A railroad proceeding under this section must first file notices of the proposed discontinuance with the Interstate Commerce Commission, with the Governors of the States in which the train operates, and in every station served by the train. After

30 days, the railroad may discontinue the train unless the Commission has decided to investigate the discontinuance. The Commission may require the railroad to continue operations, pending its investigation, for an additional four months. It also may, at the conclusion of the investigation, order service continued for another year, if it is "required by public convenience and necessity" and if it "will not unduly burden interstate . . . commerce."

Section 13a (2) governs "the discontinuance . . . of the operation or service of any train or ferry operated wholly within the boundaries of a single State." Under this section, the railroad is first required to seek relief from the appropriate state agency. Only after the state agency has denied the application of discontinuance, or has let 120 days elapse from the time the application was filed without acting, can the railroad seek authority from the Interstate Commerce Commission to discontinue the train. The Commission "may grant such authority only after full hearing."

A comparison of the language of § 13a (1), which applies to "any train . . . *operating from a point in one State to a point in any other State*" (italics supplied), and of § 13a (2), which applies to "any train . . . *operated wholly within the boundaries of a single State*" (italics supplied), makes it clear that the statute, on its face, requires appellee to proceed under the latter section. Appellee's trains do not run "from a point in one State to a point in any other State." That appellee's passengers, by other conveyances, cross a state line does not alter the conclusion; the statute speaks not of interstate commerce but of the physical limits of a train's or ferry's operations.[1]

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[1] Apparently one ground for the decision below was the belief (1) that "operation or service" of a train included bus service or (2) that "train" included a bus extension. As to the first, it should be noted that the Interstate Commerce Commission has decided, in

Any doubt about this construction of the statute is dispelled by an examination of its legislative history. Section 13a was enacted by Congress as part of the Transportation Act of 1958. The legislative history of that Act reveals Congress' concern about the financial plight of railroads, attributable in part to the losses sustained in operating passenger trains. To discontinue these trains before the enactment of § 13a, the railroads were required in all cases to seek authority from each of the States served. See 104 Cong. Rec. 10842–10843, 10851. Without concurrence of all the States affected, the railroad might be compelled to continue operations despite serious losses. The Interstate Commerce Commission was able to give only partial relief. It could authorize the total abandonment of a line of railroad under § 1 (18) of the Act, even if the line was wholly within the boundaries of one State. *Colorado* v. *United States,* 271 U. S. 153. However the Commission could not permit partial discontinuance of service over a line of railroad, whether the line crossed state boundaries or not. *Board of Public Utility Comm'rs of New Jersey* v. *United States,* 158 F. Supp. 98, probable jurisdiction noted, 357 U. S. 917, dismissed as moot, 359 U. S. 982.[2]

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interpreting § 1 (18) of the Act, that appellee's bus service to New York is not part of a "line of railroad" and that appellee need not obtain a certificate of public convenience and necessity before providing the bus transportation. *New York, S. & W. R. Co. Common Carrier Application,* 46 M. C. C. 713, 725. Admittedly "line of railroad" is a different term from "operation or service of any train." However we should be loath to suggest that a train could operate where no line of railroad existed.

As to the second alternative, it is answer enough to note that the statute reads "any train or ferry." No mention of "bus" is made.

[2] The railroads appealing to this Court did not take issue with the Interstate Commerce Commission decisions holding that the Commission lacked power to authorize partial discontinuances. They argued that instead of partially discontinuing service they were abandoning a line of railroad.

See *Palmer* v. *Massachusetts,* 308 U. S. 79, 84–85. Thus the Commission could not permit discontinuance of passenger operations while the railroad continued to carry freight over the same line.[3]

As initially proposed in the Senate, the Interstate Commerce Commission would have had power under § 13a to permit discontinuance "of the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign and intrastate commerce . . . or of the operation or service of any station, depot or other facility." S. 3778, 85th Cong., 2d Sess. Opposition to the bill focused upon the reduction of state powers to control local train operations. *E. g.,* 104 Cong. Rec. 10850. A compromise amendment in the Senate changed § 13a so that the Commission's power would extend only to "any train or ferry engaged in the transportation of passengers or property in interstate or foreign commerce." 104 Cong. Rec. 10862–10866. Reference to intrastate transportation was eliminated. And as finally reported out of conference, the Act was in its present form. The Interstate Commerce Commission's jurisdiction was limited, in the first instance, to the "discontinuance . . . of the operation or service of any train

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[3] In the *Board of Public Utility Comm'rs of New Jersey* case the three-judge District Court held that the Interstate Commerce Commission could not allow the New York Central Railroad to discontinue its passenger ferries across the Hudson River, while continuing to operate ferries for freight, if the ferries were all part of the same line of railroad. (Under § 1 (3) of the Act, the term "railroad" includes "ferries used by or operated in connection with any railroad.") After Congress passed § 13a, the New York Central Railroad, among others, succeeded in eliminating its Hudson River passenger ferries. See *New Jersey* v. *United States,* 168 F. Supp. 324, aff'd *per curiam,* 359 U. S. 27. In fact, the New York Central Railroad claimed that its inability to discontinue the passenger ferries was the reason Congress enacted § 13a. 168 F. Supp., at 337, n. 1.

or ferry operating from a point in one State to a point in any other State."

Senator Smathers, the Chairman of the Surface Transportation Subcommittee of the Senate Interstate and Foreign Commerce Committee, said, in describing the Senate compromise amendment, that:

> "any train which operates within a State, whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission." 104 Cong. Rec. 10852.[4]

Congressman Harris, Chairman of the House Interstate and Foreign Commerce Committee, similarly interpreted the more restrictive House version, H. R. 12832.[5] He said the Interstate Commerce Commission was limited to authorizing the discontinuance

> "of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the bill being reported because the

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[4] Apparently those who were concerned with the protection of the rights of the States were not satisfied with the compromise amendment, perhaps because it retained the phrase "engaged in the transportation of passengers or property in interstate . . . commerce." In any event, they were successful in obtaining the omission of any reference to transportation in interstate commerce, since the Act as passed limited Interstate Commerce Commission jurisdiction, in the first instance, to the discontinuance of "any train . . . operating from a point in one State to a point in any other State."

[5] H. R. 12832 provided that: "this section [§ 13a] shall not apply to the operations of or services performed by any carrier by railroad on a line of railroad located wholly within a single State." 104 Cong. Rec. 12547. Also, the House bill eliminated the Interstate Commerce Commission's jurisdiction over discontinuance of stations, depots and other facilities, leaving the state regulatory agencies' power untouched. This change, embodied in the Act, is additional evidence of Congress' intent to leave regulation of local operations to the States.

> committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State." 104 Cong. Rec. 12533.

Congressman Harris repeatedly stated that even if the train in question operated on an interstate line, the state regulatory agency would have jurisdiction if the train started and ended within the State. 104 Cong. Rec. 12530, 12542.

Finally, Senator Smathers' comments, made after the Senate-House Conference changed the bill to its present form, should be noted. He said:

> "we protected the right of the States . . . by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce.
>
> "In addition, the Senate receded on a provision under which we had given the Interstate Commerce Commission jurisdiction also to discontinue service in depots, terminals, and other such facilities in connection with the operation of railroads. We left that matter in the hands of the State regulatory agencies." 104 Cong. Rec. 15528.

It is clear to us from this history, as it was to the Commission, that Congress intended to, and did, leave "[j]urisdiction over trains operating wholly within a single State . . . with State regulatory commissions."

The court below disregarded the plain words of the statute and what we believe is the pertinent legislative

history and rested its decision on the ground that to apply § 13a (1) so restrictively would "thwart the apparent purpose of the Congress in adopting it." 200 F. Supp., at 864. That purpose was, as the court below observed, remedial. But it was conditioned by a desire to protect state jurisdiction over local operations. To ignore this we conclude was error. Therefore the judgment of the court below must be

*Reversed.*

# McCULLOCH, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL. *v.* SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 107. Argued December 11–12, 1962.—
Decided February 18, 1963.*

1. A corporation organized and doing business in the United States beneficially owns vessels which make regular sailings between the United States, Latin American ports and other ports, transporting the corporation's products and other supplies. Each of the vessels is legally owned by a foreign subsidiary of the American corporation, flies the flag of a foreign nation, carries a foreign crew represented by a foreign union and has other contacts with the nation of its flag. *Held:* The jurisdictional provisions of the National Labor Relations Act do not extend to the maritime operations of such foreign-flag ships employing alien seamen. Pp. 11–22.

2. Although the members of the crews of these vessels were already represented by a foreign union, the National Labor Relations Board held that the Act extends to them, and it ordered representation elections. This assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags aroused vigorous protests from foreign governments and created international problems for our Government. On application of the foreign bargaining agent of the vessels' crewmen, the United States District Court for the District of Columbia enjoined the members of the Board from conducting the elections. *Held:* This action falls within the limited exception fashioned in *Leedom* v. *Kyne*, 358 U. S. 184; the District Court had jurisdiction of the original suit

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*Together with No. 91, *McLeod, Regional Director, National Labor Relations Board*, v. *Empresa Hondurena de Vapores, S. A.*, and No. 93, *National Maritime Union of America, AFL–CIO*, v. *Empresa Hondurena de Vapores, S. A.*, both on certiorari to the United States Court of Appeals for the Second Circuit, argued and decided on the same dates.

to set aside the Board's determination because it was made in excess of the Board's powers; and the judgment of the District Court is affirmed. Pp. 14–17.

201 F. Supp. 82, affirmed.

300 F. 2d 222, judgment vacated and cases remanded.

*Dominick L. Manoli* argued the cause for petitioners in Nos. 91 and 107. With him on briefs for the Regional Director and members of the National Labor Relations Board in all three cases were *Stuart Rothman* and *Norton J. Come.*

*Herman E. Cooper* argued the cause for petitioner in No. 93. With him on the brief was *H. Howard Ostrin.*

*Charles S. Rhyne* argued the cause for respondent in No. 107. With him on the brief was *Brice W. Rhyne.*

*Orison S. Marden* argued the cause for respondent in Nos. 91 and 93. With him on the brief was *Chester Bordeau.*

*Solicitor General Cox,* by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging affirmance. With him on the brief were *Acting Assistant Attorney General Guilfoyle, Daniel M. Friedman* and *Morton Hollander.*

Briefs of *amici curiae,* urging affirmance, were filed by *Lawrence Hunt* for the Government of the United Kingdom of Great Britain and Northern Ireland, by *Robert MacCrate* for Canada, by *James F. Sams* for the Government of the Republic of Honduras, and by *Alfred Giardino* for the United Fruit Company.

A brief urging reversal was filed by *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

These companion cases, involving the same facts, question the coverage of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 541, 29 U. S. C. §§ 151 *et seq.* A corporation organized and doing business in the United States beneficially owns seagoing vessels which make regular sailings between United States, Latin American and other ports transporting the corporation's products and other supplies; each of the vessels is legally owned by a foreign subsidiary of the American corporation, flies the flag of a foreign nation, carries a foreign crew and has other contacts with the nation of its flag. The question arising is whether the Act extends to the crews engaged in such a maritime operation. The National Labor Relations Board in a representation proceeding on the application of the National Maritime Union held that it does and ordered an election. 134 N. L. R. B. 287. The vessels' foreign owner sought to enjoin the Board's Regional Director from holding the election, but the District Court for the Southern District of New York denied the requested relief. 200 F. Supp. 484. The Court of Appeals for the Second Circuit reversed, holding that the Act did not apply to the maritime operations here and thus the Board had no power to direct the election. 300 F. 2d 222. The N. M. U. had intervened in the proceeding, and it petitioned for a writ of certiorari (No. 93), as did the Regional Director (No. 91). Meanwhile, the United States District Court for the District of Columbia, on application of the foreign bargaining agent of the vessels' crewmen, enjoined the Board members in No. 107. 201 F. Supp. 82. We granted each of the three petitions for certiorari, 370 U. S. 915, and consolidated the cases for argument.[1]

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[1] In No. 107, appeal was perfected to the Court of Appeals for the District of Columbia Circuit, to which court we granted a writ of certiorari before judgment.

We have concluded that the jurisdictional provisions of the Act do not extend to maritime operations of foreign-flag ships employing alien seamen.

I.

The National Maritime Union of America, AFL–CIO, filed a petition in 1959 with the National Labor Relations Board seeking certification under § 9 (c) of the Act, 29 U. S. C. § 159 (c), as the representative of the unlicensed seamen employed upon certain Honduran-flag vessels owned by Empresa Hondurena de Vapores, S. A., a Honduran corporation. The petition was filed against United Fruit Company, a New Jersey corporation which was alleged to be the owner of the majority of Empresa's stock. Empresa intervened and on hearing it was shown that United Fruit owns all of its stock and elects its directors, though no officer or director of Empresa is an officer or director of United Fruit and all are residents of Honduras. In turn the proof was that United Fruit is owned by citizens of the United States and maintains its principal office at Boston. Its business was shown to be the cultivation, gathering, transporting and sale of bananas, sugar, cacao and other tropical produce raised in Central and South American countries and sold in the United States.

United Fruit maintains a fleet of cargo vessels which it utilizes in this trade. A portion of the fleet consists of 13 Honduran-registered vessels operated [2] by Empresa and time chartered to United Fruit, which vessels were included in National Maritime Union's representation proceeding. The crews on these vessels are recruited by Empresa in Honduras. They are Honduran citizens (save one Jamaican) and claim that country as their

[2] Ten of the 13 vessels are owned and operated by Empresa. Three are owned by Balboa Shipping Co., Inc., a Panamanian subsidiary of United Fruit. Empresa acts as an agent for Balboa in the management of the latter vessels.

residence and home port. The crew are required to sign Honduran shipping articles, and their wages, terms and condition of employment, discipline, etc., are controlled by a bargaining agreement between Empresa and a Honduran union, Sociedad Nacional de Marineros de Honduras. Under the Honduran Labor Code only a union whose "juridic personality" is recognized by Honduras and which is composed of at least 90% of Honduran citizens can represent the seamen on Honduran-registered ships. The N. M. U. fulfils neither requirement. Further, under Honduran law recognition of Sociedad as the bargaining agent compels Empresa to deal exclusively with it on all matters covered by the contract. The current agreement in addition to recognition of Sociedad provides for a union shop, with a no-strike-or-lockout provision, and sets up wage scales, special allowances, maintenance and cure provisions, hours of work, vacation time, holidays, overtime, accident prevention, and other details of employment as well.

United Fruit, however, determines the ports of call of the vessels, their cargoes and sailings, integrating the same into its fleet organization. While the voyages are for the most part between Central and South American ports and those of the United States, the vessels each call at regular intervals at Honduran ports for the purpose of taking on and discharging cargo and, where necessary, renewing the ship's articles.

## II.

The Board concluded from these facts that United Fruit operated a single, integrated maritime operation within which were the Empresa vessels, reasoning that United Fruit was a joint employer with Empresa of the seamen covered by N. M. U.'s petition. Citing its own *West India Fruit & Steamship Co.* opinion, 130 N. L. R. B. 343 (1961), it concluded that the maritime

operations involved substantial United States contacts, outweighing the numerous foreign contacts present. The Board held that Empresa was engaged in "commerce" within the meaning of § 2 (6) of the Act [3] and that the maritime operations "affected commerce" within § 2 (7),[4] meeting the jurisdictional requirement of § 9 (c)(1).[5] It therefore ordered an election to be held among the seamen signed on Empresa's vessels to determine whether they wished N. M. U., Sindicato Maritimo Nacional de Honduras,[6] or no union to represent them.

As we have indicated, both Empresa and Sociedad brought suits in Federal District Courts to prevent the election, Empresa proceeding in New York against the Regional Director—Nos. 91 and 93—and Sociedad in the

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[3] 29 U. S. C. § 152 (6):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

[4] 29 U. S. C. § 152 (7):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

[5] 29 U. S. C. § 159 (c)(1):

"Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing . . . ."

Section 10 (a) of the Act, 29 U. S. C. § 160 (a), imposes the same requirement, empowering the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce."

[6] Sindicato, a Honduran union, had intervened in the proceeding. Sociedad was invited to intervene but declined to do so.

District of Columbia against the members of the Board—No. 107. In Nos. 91 and 93 the jurisdiction of the District Court was challenged on two grounds: first, that review of representation proceedings is limited by § 9 (d) of the Act, 29 U. S. C. § 159 (d), to indirect review as part of a petition for enforcement or review of an order entered under § 10 (c), 29 U. S. C. § 160 (c); and, second, that the Board members were indispensable parties to the action. The challenge based upon § 9 (d) was not raised or adjudicated in Sociedad's action against the Board members—No. 107—and the indispensable-parties challenge is of course not an issue. Sociedad is not a party in Nos. 91 and 93, although the impact of the Board order—the same order challenged in No. 107—is felt by it. That order has the effect of canceling Sociedad's bargaining agreement with Empresa's seamen, since Sociedad is not on the ballot called for by the Board. No. 107, therefore, presents the question in better perspective, and we have chosen it as the vehicle for our adjudication on the merits. This obviates our passing on the jurisdictional questions raised in Nos. 91 and 93, since the disposition of those cases is controlled by our decision in No. 107.

We are not of course precluded from reexamining the jurisdiction of the District Court in Sociedad's action, merely because no challenge was made by the parties. *Mitchell* v. *Maurer,* 293 U. S. 237, 244 (1934). Having examined the question whether the District Court had jurisdiction at the instance of Sociedad to enjoin the Board's order, we hold that the action falls within the limited exception fashioned in *Leedom* v. *Kyne,* 358 U. S. 184 (1958). In that case judicial intervention was permitted since the Board's order was "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.,* at 188. While here the Board has violated no specific prohibition in the Act, the overriding consideration is that the Board's assertion of power to determine

the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power. No question of remotely comparable urgency was involved in *Kyne,* which was a purely domestic adversary situation. The exception recognized today is therefore not to be taken as an enlargement of the exception in *Kyne.*

## III.

Since the parties all agree that the Congress has constitutional power to apply the National Labor Relations Act to the crews working foreign-flag ships, at least while they are in American waters, *The Exchange,* 7 Cranch 116, 143 (1812); *Wildenhus's Case,* 120 U. S. 1, 11 (1887); *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138, 142 (1957), we go directly to the question whether Congress exercised that power. Our decision on this point being dispositive of the case, we do not reach the other questions raised by the parties and the *amici curiae.*

The question of application of the laws of the United States to foreign-flag ships and their crews has arisen often and in various contexts.[7] As to the application of the National Labor Relations Act and its amendments, the Board has evolved a test relying on the relative weight of a ship's foreign as compared with its American contacts. That test led the Board to conclude here, as in *West India Fruit & Steamship Co., supra,* that the foreign-flag ships' activities affected "commerce" and brought

[7] See generally Comment, 69 Yale L. J. 498, 506–511 (1960); Boczek, Flags of Convenience (1962).

them within the coverage of the Act. Where the balancing of the vessel's contacts has resulted in a contrary finding, the Board has concluded that the Act does not apply.[8]

Six years ago this Court considered the question of the application of the Taft-Hartley amendments to the Act in a suit for damages "resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel [was] temporarily in an American port." *Benz* v. *Compania Naviera Hidalgo, supra,* at 139. We held that the Act did not apply, searching the language and the legislative history and concluding that the latter "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Id.,* at 144. Subsequently, in *Marine Cooks & Stewards* v. *Panama S. S. Co.,* 362 U. S. 365 (1960), we held that the Norris-LaGuardia Act, 29 U. S. C. § 101, deprived a Federal District Court of jurisdiction to enjoin picketing of a foreign-flag ship, specifically limiting the holding to the jurisdiction of the court "to issue the injunction it did under the circumstances shown." *Id.,* at 372. That case cannot be regarded as limiting the earlier *Benz* holding, however, since no question as to "whether the picketing . . . was tortious under state or federal law" was either presented or decided. *Ibid.* Indeed, the Court specifically noted that the application of the Norris-LaGuardia Act "to curtail and regulate the jurisdiction of courts" differs from the application of the Taft-Hartley Act "to regulate the conduct of people engaged in labor disputes." *Ibid.;* see Comment, 69 Yale L. J. 498, 523–525 (1960).

It is contended that this case is nonetheless distinguishable from *Benz* in two respects. First, here there is a fleet of vessels not temporarily in United States waters but

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[8] *E. g., Dalzell Towing Co.,* 137 N. L. R. B. No. 48, 50 L. R. R. M. 1164 (1962).

operating in a regular course of trade between foreign ports and those of the United States; and, second, the foreign owner of the ships is in turn owned by an American corporation. We note that both of these points rely on additional American contacts and therefore necessarily presume the validity of the "balancing of contacts" theory of the Board. But to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis.[9] This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore, appears to us more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen.

Petitioners say that the language of the Act may be read literally as including foreign-flag vessels within its coverage. But, as in *Benz,* they have been unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent. Indeed, the opposite is true as we found in *Benz,* where

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[9] Our conclusion does not foreclose such a procedure in different contexts, such as the Jones Act, 46 U. S. C. § 688, where the pervasive regulation of the internal order of a ship may not be present. As regards application of the Jones Act to maritime torts on foreign ships, however, the Court has stated that "[p]erhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag." *Lauritzen* v. *Larsen,* 345 U. S. 571, 584 (1953); see *Romero* v. *International Terminal Operating Co.,* 358 U. S. 354, 381–384 (1959); Boczek, *op. cit., supra,* note 7, at 178–180.

we pointed to the language of Chairman Hartley characterizing the Act as "a bill of rights both for *American* workingmen and for their employers." 353 U. S., at 144. We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews.[10] Therefore, we find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department [11]

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[10] In 1959 Congress enacted § 14 (c)(1) of the Act, 29 U. S. C. (Supp. II) § 164 (c)(1), granting the Board discretionary power to decline jurisdiction over labor disputes with insubstantial effects, with a proviso that:

". . . the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

It is argued that the Board would have exerted jurisdiction over Empresa's vessels and crewmen under those "standards," as illustrated by its action in *Peninsular & Occidental Steamship Co.*, 120 N. L. R. B. 1097 (1958), about which case the Congress is presumed to have known. Aside from the fact that Congress presumably was aware also of our decision in *Benz*, the argument is unconvincing. Nothing in the language or the legislative history of the 1959 amendments to the Act clearly indicates a congressional intent to apply the Act to foreign-flag ships and their crews. The "standards" to which § 14 (c)(1) refers are the minimum dollar amounts established by the Board for jurisdictional purposes, and the problem to which § 14 (c) is addressed is the "no-man's land" created by *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1957). See 25 N. L. R. B. Ann. Rep. 18–19 (1960); II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959), 1153–1154, 1720; 105 Cong. Rec. 6548–6549, 18134.

[11] State Department regulations provide that a foreign vessel includes "any vessel regardless of ownership, which is documented under the laws of a foreign country." 22 CFR § 81.1 (f).

but also by the Congress.[12] In addition, our attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship. See *Wildenhus's Case, supra,* at 12; Colombos, The International Law of the Sea (3d rev. ed. 1954), 222–223. The possibility of international discord cannot therefore be gainsaid. Especially is this true on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction. Sociedad, currently the exclusive bargaining agent of Empresa under Honduran law, would have a head-on collision with N. M. U. should it become the exclusive bargaining agent under the Act. This would be aggravated by the fact that under Honduran law N. M. U. is prohibited from representing the seamen on Honduran-flag ships even in the absence of a recognized bargaining agent. Thus even though Sociedad withdrew from such an intramural labor fight—a highly unlikely circumstance—questions of such international import would remain as to invite retaliatory action from other nations as well as Honduras.

The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in *The Charming Betsy,* 2 Cranch 64, 118 (1804), that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." We therefore conclude, as we did in *Benz,* that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must

[12] Article X of the Treaty of Friendship, Commerce and Consular Rights between Honduras and the United States, 45 Stat. 2618 (1927), provides that merchant vessels flying the flags and having the papers of either country "shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

be present the affirmative intention of the Congress clearly expressed." 353 U. S., at 147. Since neither we nor the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election. This is not to imply, however, "any impairment of our own sovereignty, or limitation of the power of Congress" in this field. *Lauritzen* v. *Larsen,* 345 U. S. 571, 578 (1953). In fact, just as we directed the parties in *Benz* to the Congress, which "alone has the facilities necessary to make fairly such an important policy decision," 353 U. S., at 147, we conclude here that the arguments should be directed to the Congress rather than to us. Cf. *Lauritzen* v. *Larsen, supra,* at 593.

The judgment of the District Court is therefore affirmed in No. 107. The judgment of the Court of Appeals in Nos. 91 and 93 is vacated and the cases are remanded to that court, with instructions that it remand to the District Court for dismissal of the complaint in light of our decision in No. 107. *It is so ordered.*

MR. JUSTICE GOLDBERG took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, concurring.[1]

I had supposed that the activities of American labor organizations whether related to domestic vessels or to foreign ones were covered by the National Labor Relations Act, at least absent a treaty which evinces a different policy.[2] Cf. *Cook* v. *United States,* 288 U. S. 102, 118–

[1] [This opinion applies also to No. 33, *Incres Steamship Co., Ltd.,* v. *International Maritime Workers, post,* p. 24.]

[2] It is agreed that Article XXII of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Honduras, 45 Stat. 2618 (1927), and Article X of the Convention with Liberia of October 7, 1938, 54 Stat. 1751, 1756, grant those nations exclusive jurisdiction over the matters here involved.

120. But my views were rejected in *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138; and, having lost that cause in *Benz,* I bow to its inexorable extension here. The practical effect of our decision is to shift from all the taxpayers to seamen alone the main burden of financing an executive policy of assuring the availability of an adequate American-owned merchant fleet for federal use during national emergencies. See Note, Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts, 60 Col. L. Rev. 711.

# INCRES STEAMSHIP CO., LTD., *v.* INTERNATIONAL MARITIME WORKERS UNION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 33. Argued December 12, 1962.—Decided February 18, 1963.

Petitioner is a Liberian corporation which is wholly owned by Italian nationals. It operates two Liberian-registered ships which make regularly scheduled cruises between New York City and various Caribbean ports for seven months each year and annual cruises to Italy, where they undergo repairs and the crews take their leaves. The crews are nonresident aliens, mostly Italians, and they are recruited and hired in Italy, where they sign Liberian articles. Respondent union is an American labor organization formed for the primary purpose of organizing foreign seamen on foreign-flag ships, and it began picketing petitioner's ships while one was docked in New York and the other anchored offshore. Petitioner sued in a New York State Court for injunctive relief, which was granted. *Held:* The National Labor Relations Act is inapplicable to the maritime operations of foreign-flag ships employing alien seamen, *McCulloch* v. *Sociedad Nacional, ante,* p. 10, and it did not deprive the State Court of jurisdiction to grant such relief. Pp. 24–28.

10 N. Y. 2d 218, 176 N. E. 2d 719, judgment vacated and cause remanded.

*Breck P. McAllister* argued the cause for petitioner. With him on the briefs were *George S. Leisure* and *Peter W. Mitchell.*

*H. Howard Ostrin* argued the cause for respondents. With him on the brief was *Herman E. Cooper.*

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Daniel M. Friedman* and *Morton Hollander* for the United States, by *Lawrence Hunt* for the Government of the United Kingdom of Great Britain and Northern Ireland, by *Herbert Brownell* and *Jack P. Jef-*

*feries* for the Republic of Panama, and by *Burton H. White* for the Republic of Liberia.

A brief urging affirmance was filed by *Neal Rutledge* for the Seafarers' International Union of North America, as *amicus curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The basic issue in this case, the application of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 541, 29 U. S. C. §§ 151 *et seq.*, is decided this day in *McCulloch* v. *Sociedad Nacional, ante,* p. 10. In view of factual differences and procedural dissimilarity from that case, however, we find it appropriate to write briefly.

The petitioner, Incres Steamship Company, Ltd., is a Liberian corporation which is wholly owned by Italian nationals. It operates two Liberian-registered passenger ships, the *Nassau* and the *Victoria,* which make regularly scheduled cruises between New York City and various Caribbean ports for seven months each year. In addition, annual cruises are made to Italy, where the vessels undergo repairs and the crews take their leaves. The crews of both vessels are nonresident aliens, most of whom are Italians, and they are recruited and hired in Italy, where they sign Liberian articles.

Incres maintains its principal office in London, and it has no place of business in Liberia. It shares an office in New York City with Incres Line Agency, Inc., a New York corporation which is controlled by Incres and acts as agent for its cruise business. The president of Incres, an Italian national, who is a part-time New York resident, is also an unpaid officer and director of Incres Line Agency. He conducts business of Incres from the Incres Line Agency office when he is in New York.

The respondent, International Maritime Workers Union, is an American labor organization formed by two other American unions for the primary purpose of organiz-

ing foreign seamen on foreign-flag ships. In February of 1960 it began a campaign to organize the seamen on Incres' vessels. On May 13, 1960, as part of this campaign, IMWU began picketing at the pier where the *Nassau* was docked. Two days later the *Victoria,* while anchored offshore, was picketed by IMWU representatives in a launch. The IMWU representatives persuaded some crew members of the *Nassau* not to perform their duties, and longshoremen and tugboat crews were temporarily persuaded to refrain from servicing both vessels. As a result of this activity, several cruises were canceled.

On May 16, 1960, Incres brought this action for damages and injunctive relief against IMWU. On the same day IMWU filed unfair labor practice charges against Incres, on which the National Labor Relations Board has conducted an investigation but has not rendered a decision. The Supreme Court of New York County granted a temporary and, after trial, a permanent injunction enjoining the union from picketing Incres' vessels or from encouraging crew members to refrain from working on those vessels. The Appellate Division affirmed. 11 App. Div. 2d 177, 202 N. Y. S. 2d 692. The New York Court of Appeals, by a divided court, reversed. 10 N. Y. 2d 218, 176 N. E. 2d 719. Applying our decision in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), it held that the state courts had no jurisdiction until the Board refused to act in the dispute, since it was "surely arguable" that the Board would exercise jurisdiction under the contacts theory as applied in *West India Fruit & Steamship Co.,* 130 N. L. R. B. 343 (1961), and other Board decisions. We granted certiorari, 368 U. S. 924, and the case was argued with *McCulloch* v. *Sociedad Nacional, supra,* and its companion cases.

We held today in *Sociedad Nacional* that the Act does not apply to foreign-registered ships employing alien sea-

men. The holding and reasoning in that case are equally applicable to the maritime operations here, leading to the conclusion that the Act does not apply. It is true that our decision in *Garmon, supra,* as applied in *Marine Engineers Beneficial Assn.* v. *Interlake S. S. Co.,* 370 U. S. 173 (1962), results in pre-emption of state court jurisdiction if a dispute is arguably within the jurisdiction of the Board. But, although it was arguable that the Board's jurisdiction extended to this dispute at the time of the New York Court of Appeals' decision, our decision in *Sociedad Nacional* clearly negates such jurisdiction now. In that case we were immediately concerned with the Board's jurisdiction to direct an election, holding that the Act had no application to the operations of foreign-flag ships employing alien crews. Therefore, no different result as to Board jurisdiction follows from the fact that our immediate concern here is the picketing of a foreign-flag ship by an American union. See *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957). The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances "affecting commerce," and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in "commerce" within the meaning of § 2 (6), 29 U. S. C. § 152 (6).

No different result is suggested by our decision in *Teamsters Union* v. *New York, N. H. & H. R. Co.,* 350 U. S. 155 (1956). There we held that a railroad, subject to the Railway Labor Act and thus exempt from the definition of "employer" in the National Labor Relations Act, was not thereby precluded from "seeking the aid of the Board in circumstances unrelated to its employer-employee relations." *Id.,* at 159. Therefore, in a situation where a union "was in no way concerned with [the railroad's] labor policy," *id.,* at 160, but sought to prevent motor carrier employees from delivering truck-trailers to the

railroad for "piggy-back" carriage, we held that state court jurisdiction was pre-empted by the Act. Here, of course, the IMWU's activities are directly related to Incres' employer-employee relationships, since the very purpose of those activities was the organization of alien seamen on Incres' vessels.

For the reasons stated, the judgment of the Court of Appeals is vacated and the cause is remanded for further proceedings consistent with this opinion and that in *Sociedad Nacional.*

*It is so ordered.*

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

[For concurring opinion of MR. JUSTICE DOUGLAS, see *ante,* p. 22.]

# UNITED STATES *v.* NATIONAL DAIRY PRODUCTS CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 18. Argued March 21, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued December 5, 1962.—Decided February 18, 1963.

Section 3 of the Robinson-Patman Act, making it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," is not unconstitutionally vague or indefinite as applied to sales made *below cost* without any legitimate commercial objective and with specific intent to destroy competition. Pp. 29–37.

Reversed and remanded for trial.

*Daniel M. Friedman* reargued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum.*

*John T. Chadwell* reargued the cause for appellees. With him on the briefs were *Richard W. McLaren, James A. Rahl, Jean Engstrom, Martin J. Purcell* and *John H. Lashly.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This case involves the question whether § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, making it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," is unconstitutionally vague and indefinite as applied to sales made *below cost* with such purpose. National Dairy and Raymond J. Wise, a vice-president and director, upon being charged, *inter alia,* with violating § 3 by making sales below cost for the purpose of destroying competition, moved for dismissal of the Robinson-Pat-

man Act counts of the indictment on the ground that the statute is unconstitutionally vague and indefinite. The District Court granted the motion and ordered dismissal. On direct appeal under the Criminal Appeals Act, 18 U. S. C. § 3731, we noted probable jurisdiction, 368 U. S. 808, because of the importance of the issue in the administration of the Robinson-Patman Act. We have concluded that the order of dismissal was error and therefore remand the case for trial.

I.

National Dairy is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States. Through its processing plant in Kansas City, Missouri, National Dairy has for the past several years been in competition with national concerns and various local dairies in the Greater Kansas City area and the surrounding areas of Kansas and Missouri. In the Greater Kansas City market National Dairy distributes its products directly, but cities and towns in the surrounding Kansas and Missouri areas outside this market are served by independent distributors who purchase milk from National Dairy and resell on their own account.

The indictment charged violations of both the Sherman Act, 15 U. S. C. § 1, and the Robinson-Patman Act in Kansas City and in six local markets in the adjacent area.[1] The Robinson-Patman counts charged National

[1] Seven counts of the 15-count indictment charged violations of § 3 of the Robinson-Patman Act. The Sherman Act and Robinson-Patman Act counts relate to the same course of conduct.

One Robinson-Patman count, number 13, charges Raymond J. Wise, a vice-president and director of National, with authorizing National's pricing practice and ordering its effectuation in the Kansas City market. *United States* v. *Wise*, 370 U. S. 405 (1962), involves two Sherman Act counts of the indictment which named Wise as a defendant.

Dairy and Wise with selling milk in those markets "at unreasonably low prices for the purpose of destroying competition." Further specifying the acts complained of, the indictment charged National Dairy with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it . . . by intentionally selling milk [directly or to a distributor] at prices below National's cost." In five of the markets National Dairy's pricing practice was alleged to have resulted in "severe financial losses to small dairies," and in two others the effect was claimed to have been to "eliminate competition" and "drive small dairies from" the market.

National Dairy and Wise moved to dismiss all of the Robinson-Patman counts on the grounds that the statutory provision, "unreasonably low prices," is so vague and indefinite as to violate the due process requirement of the Fifth Amendment and an indictment based on this provision is violative of the Sixth Amendment in that it does not adequately apprise them of the charges. The District Court, after rendering an oral opinion holding that § 3 of the Robinson-Patman Act is unconstitutionally vague and indefinite, granted the motion and ordered dismissal of the § 3 counts. The case came here on direct appeal from the order of dismissal.

## II.

National Dairy and Wise urge that § 3 is to be tested solely "on its face" rather than as applied to the conduct charged in the indictment, *i. e.*, sales below cost for the purpose of destroying competition. The Government, on the other hand, places greater emphasis on the latter, contending that whether or not there is doubt as to the validity of the statute in all of its possible applications,

§ 3 is plainly constitutional in its application to the conduct alleged in the indictment.

It is true that a statute attacked as vague must initially be examined "on its face," but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination.

We do not evaluate § 3 in the abstract.

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *United States* v. *Raines,* 362 U. S. 17, 22 (1960).

The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E. g., Jordan* v. *De George,* 341 U. S. 223, 231 (1951), and *United States* v. *Petrillo,* 332 U. S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E. g., United States* v. *Rumely,* 345 U. S. 41, 47 (1953); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); see *Screws* v. *United States,* 325 U. S. 91 (1945).

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably

understand that his contemplated conduct is proscribed. *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. *Robinson* v. *United States*, 324 U. S. 282 (1945). In view of these principles we must conclude that if § 3 of the Robinson-Patman Act gave National Dairy and Wise sufficient warning that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them.[2] This is not to say that a bead-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage. We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that selling "below cost" with predatory intent was within its prohibition of "unreasonably low prices."

## III.

The history of § 3 of the Robinson-Patman Act indicates that selling below cost, unless mitigated by some acceptable business exigency, was intended to be prohibited by the words "unreasonably low prices." That sales below cost without a justifying business reason may come within the proscriptions of the Sherman Act has long been established. See, *e. g.*, *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911). Further, when the Clayton Act was enacted in 1914 to strengthen the Sherman Act, Congress passed § 2 to cover price discrimination by large companies which compete by lowering prices, "oftentimes below the cost of production . . .

[2] It should be noted that, in reviewing a case in which a motion to dismiss was granted, we are required to accept well-pleaded allegations of the indictment as the hypothesis for decision. *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 343 (1952).

with the intent to destroy and make unprofitable the business of their competitors." H. R. Rep. No. 627, 63d Cong., 2d Sess. 8. The 1936 enactment of the Robinson-Patman Act was for the purpose of "strengthening the Clayton Act provisions," *Federal Trade Comm'n* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 544 (1960), and the Act was aimed at a specific weapon of the monopolist—predatory pricing. Moreover, § 3 was described by Representative Utterback, a House manager of the joint conference committee, as attaching "criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act." 80 Cong. Rec. 9419.

This Court, in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954), a case based in part on § 3, recognized the applicability of the Robinson-Patman Act to conduct quite similar to that with which National Dairy and Wise are charged here. The Court said, "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through programs in which "profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Id.*, at 120, 119.

In proscribing sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" we believe that Congress condemned sales made below cost for such purpose. And we believe that National Dairy and Wise could reasonably understand from the statutory language that the conduct described in the indictment was proscribed by the Act. They say, however, that this is but the same horse with a different bridle because the phrase "below cost" is itself a vague and indefinite expression in business.

Whether "below cost" refers to "direct" or "fully distributed" cost or some other level of cost computation cannot be decided in the abstract. There is nothing in the record on this point, and it may well be that the issue

will be rendered academic by a showing that National Dairy sold below any of these cost levels. Therefore, we do not reach this issue here. As we said in *Automatic Canteen Co.* v. *Federal Trade Comm'n,* 346 U. S. 61, 65 (1953): "Since precision of expression is not an outstanding characteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings."

Finally, we think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws* v. *United States,* 325 U. S. 91 (1945), in which a requirement of intent served to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.,* at 102; see *id.,* at 101–107. Proscribed by the statute in *Screws* was the intentional achievement of a result, *i. e.,* the willful deprivation of certain rights. The Act here, however, in prohibiting sales at unreasonably low prices for the purpose of destroying competition, listed as elements of the illegal conduct not only the intent to achieve a *result*—destruction of competition—but also the *act*—selling at unreasonably low prices—done in furtherance of that design or purpose. It seems clear that the necessary specificity of warning is afforded when, as here, separate, though related, statutory elements of prohibited activity come to focus on one course of conduct.

*United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921), on which much reliance is placed, is inapposite here. In *Cohen* the Act proscribed "any unjust or unreasonable rate or charge." The charge in the indictment was in the exact language of the statute, and, in specifying the conduct covered by the charge, the indictment did

nothing more than state the price the defendant was alleged to have collected. Hence, the Court held that a "specific or definite" act was neither proscribed by the Act nor alleged in the indictment. *Id.*, at 89. Moreover, the standard held too vague in *Cohen* was without a meaningful referent in business practice or usage. "[T]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . . ." *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 240–241 (1925). In view of the business practices against which § 3 was unmistakably directed and the specificity of the violations charged in the indictment here, both absent in *Cohen*, the proffered analogy to that case must be rejected.

In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940); *NAACP* v. *Button*, 371 U. S. 415. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. We are thus permitted to consider the warning provided by § 3 not only in terms of the statute "on its face" but also in the light of the conduct to which it is applied. The reliance of National Dairy and Wise on First Amendment cases is therefore misplaced.

## IV.

This opinion is not to be construed, however, as holding that every sale below cost constitutes a violation of § 3. Such sales are not condemned when made in furtherance of a legitimate commercial objective, such as the

liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor. 80 Cong. Rec. 6332, 6334; see *Ben Hur Coal Co.* v. *Wells,* 242 F. 2d 481 (C. A. 10th Cir. 1957). Sales below cost in these instances would neither be "unreasonably low" nor made with predatory intent. But sales made below cost without legitimate commercial objective and with specific intent to destroy competition would clearly fall within the prohibitions of § 3.

Since the indictment charges the latter conduct and, as noted, *supra,* n. 2, we are bound by the well-pleaded allegations of the indictment, we must conclude that National Dairy and Wise were adequately forewarned of the illegal conduct charged against them and remand the case for trial. Our holding, of course, does not foreclose proof on the merits as to the reasonableness of the alleged pricing conduct or, for that matter, the absence of the predatory intent necessary to conviction.

*Reversed and remanded.*

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG join, dissenting.

The statute here involved makes it a crime to sell "goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 15 U. S. C. § 13a. In *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921), this Court held unconstitutional and void for vagueness a statute which made it a crime "for any person willfully . . . to make any unjust or unreasonable rate or charge" in dealing in or with any necessaries. The rule established by that case has been often followed,[1] is in my judgment sound, and should control this case. Ac-

[1] *E. g., Cline* v. *Frink Dairy Co.,* 274 U. S. 445 (1927); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); cf. *United States* v. *Cardiff,* 344 U. S. 174 (1952).

cordingly, I would affirm the District Court's judgment holding the statute invalid. The Court here attempts by interpretation to substitute unambiguous standards for the vague standard of "unreasonably low prices" used by Congress in the statute. It seems to me that if this criminal statute is to be so drastically reconstructed it should be done by Congress, not by us. Moreover, I agree with the Attorney General's National Committee to Study the Antitrust Laws, which concluded:

> "Doubts besetting Section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law." [2]

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[2] Atty. Gen. Nat. Comm. Antitrust Rep. 201 (1955) (recommending repeal of § 3).

## UNITED STATES *v.* GILMORE ET UX.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 21. Argued March 27–28, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued December 5–6, 1962.—Decided February 18, 1963.

Respondent sued for refund of part of the income taxes paid by him for the years 1953 and 1954, on the ground that legal expenses incurred by him in defending divorce litigation with his former wife were deductible under § 23 (a) (2) of the Internal Revenue Code of 1939, as amended, which allows as deductions from gross income "ordinary and necessary expenses . . . incurred . . . for the conservation . . . of property held for the production of income." His gross income was derived almost entirely from his salary as president of three corporations which were franchised automobile dealers and from dividends from his controlling stock in such corporations. His wife had sued for divorce, alimony and an alleged community property interest in such stock, and he alleged that, had he not succeeded in defeating these claims, he might have lost his stock, his corporate positions and the dealer franchises, from which nearly all of his income was derived. *Held:* None of respondent's expenditures in resisting these claims is deductible under § 23 (a) (2). Pp. 40–52.

(a) The origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was "business" or "personal" and hence whether or not it is deductible under § 23 (a) (2). Pp. 44–51.

(b) The wife's claims stemmed entirely from the marital relationship, and not, under any tenable view of things, from income-producing activity. Therefore, none of respondent's expenditures in resisting these claims can be deemed "business" expenses deductible under § 23 (a) (2). Pp. 51–52.

— Ct. Cl. —, 290 F. 2d 942, reversed and case remanded.

*Wayne G. Barnett* reargued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Richard J.*

*Medalie, Melva M. Graney, Harold C. Wilkenfeld* and *Arthur I. Gould.*

*Eli Freed* reargued the cause and filed briefs for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In 1955 the California Supreme Court confirmed the award to the respondent taxpayer of a decree of absolute divorce, without alimony, against his wife Dixie Gilmore.[1] 45 Cal. 2d 142, 287 P. 2d 769. The case before us involves the deductibility for federal income tax purposes of that part of the husband's legal expense incurred in such proceedings as is attributable to his successful resistance of his wife's claims to certain of his assets asserted by her to be community property under California law.[2] The claim to such deduction, which has been upheld by the Court of Claims, — Ct. Cl. —, 290 F. 2d 942, is founded on § 23 (a)(2) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) § 23 (a)(2), which allows as deductions from gross income

> ". . . ordinary and necessary expenses . . . incurred during the taxable year[3] . . . for the . . . conservation . . . of property held for the production of income."

Because of a conflict of views among the Court of Claims, the Courts of Appeals, and the Tax Court regarding the

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[1] Despite the divorce, Dixie Gilmore is referred to throughout this opinion as the "wife."

[2] Although the second Mrs. Gilmore, having been a party to one of the tax returns involved in this case, is also a respondent here, Mr. Gilmore will be referred to herein as the sole respondent.

[3] The taxable years in question are 1953 and 1954. The year 1954 is governed by the 1954 Code. Since the relevant provisions, §§ 212 and 262, are substantially identical with those of the 1939 Code, for the sake of clarity we shall refer only to the 1939 Code.

proper application of this provision,[4] and the continuing importance of the question in the administration of the federal income tax laws, we granted certiorari on the Government's petition. 368 U. S. 816. The case was first argued at the last Term and set for reargument at this one. 369 U. S. 835.

At the time of the divorce proceedings, instituted by the wife but in which the husband also cross-claimed for divorce, respondent's property consisted primarily of controlling stock interests in three corporations, each of which was a franchised General Motors automobile dealer.[5] As president and principal managing officer of the three corporations, he received salaries from them aggregating about $66,800 annually, and in recent years his total annual dividends had averaged about $83,000. His total annual income derived from the corporations was thus approximately $150,000. His income from other sources was negligible.[6]

As found by the Court of Claims, the husband's overriding concern in the divorce litigation was to protect these assets against the claims of his wife. Those claims had two aspects: *first,* that the earnings accumulated and retained by these three corporations during the Gilmores' marriage (representing an aggregate increase in corporate net worth of some $600,000) were the product of respondent's personal services, and not the result of accretion in capital values, thus rendering respondent's stockholdings in the enterprises *pro tanto* community property

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[4] Compare *Lewis* v. *Commissioner,* 253 F. 2d 821 (C. A. 2d Cir.), and *Douglas* v. *Commissioner,* 33 T. C. 349, with *Gilmore* v. *United States,* — Ct. Cl. —, 290 F. 2d 942—the present case—and *Baer* v. *Commissioner,* 196 F. 2d 646 (C. A. 8th Cir.).

[5] He owned 100% of the outstanding stock of Don Gilmore-San Francisco, 73⅓% of the outstanding stock of Don Gilmore-Hayward, and 60% of the outstanding stock of Don Gilmore-Riverside.

[6] $1,024.90 in 1953, and $516.60 in 1954.

under California law;[7] *second,* that to the extent that such stockholdings were community property, the wife, allegedly the innocent party in the divorce proceeding, was entitled under California law to more than a one-half interest in such property.[8]

The respondent wished to defeat those claims for two important reasons. *First,* the loss of his controlling stock interests, particularly in the event of their transfer in substantial part to his hostile wife, might well cost him the loss of his corporate positions, his principal means of livelihood. *Second,* there was also danger that if he were found guilty of his wife's sensational and reputation-damaging charges of marital infidelity, General Motors Corporation might find it expedient to exercise its right to cancel these dealer franchises.

The end result of this bitterly fought divorce case was a complete victory for the husband. He, not the wife, was granted a divorce on his cross-claim; the wife's community property claims were denied in their entirety; and she was held entitled to no alimony. 45 Cal. 2d 142, 287 P. 2d 769.

Respondent's legal expenses in connection with this litigation amounted to $32,537.15 in 1953 and $8,074.21 in 1954—a total of $40,611.36 for the two taxable years in question. The Commissioner of Internal Revenue found all of these expenditures "personal" or "family" expenses and as such none of them deductible. 26 U. S. C. (1952

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[7] See *Pereira* v. *Pereira,* 156 Cal. 1, 103 P. 488; *Lenninger* v. *Lenninger,* 167 Cal. 297, 139 P. 679; *Huber* v. *Huber,* 27 Cal. 2d 784, 167 P. 2d 708.

[8] Under California law a party granted a divorce on grounds of extreme cruelty or adultery may, in the court's discretion, be awarded up to all of the community property of the marriage. Cal. Civ. Code § 146. See *Barham* v. *Barham,* 33 Cal. 2d 416, 202 P. 2d 289; *Wilson* v. *Wilson,* 159 Cal. App. 2d 330, 323 P. 2d 1017. Such grounds for divorce were alleged by each of these spouses against the other.

ed.) § 24 (a)(1).[9] In the ensuing refund suit, however, the Court of Claims held that 80% of such expense (some $32,500) was attributable to respondent's defense against his wife's community property claims respecting his stockholdings and hence deductible under § 23 (a)(2) of the 1939 Code as an expense "incurred . . . for the . . . conservation . . . of property held for the production of income." In so holding the Court of Claims stated:

> "Of course it is true that in every divorce case a certain amount of the legal expenses are incurred for the purpose of obtaining the divorce and a certain amount are incurred in an effort to conserve the estate and are not necessarily deductible under section 23 (a)(2), but when the facts of a particular case clearly indicate [as here] that the property, around which the controversy evolves, is held for the production of income and without this property the litigant might be denied not only the property itself but the means of earning a livelihood, then it must come under the provisions of section 23 (a)(2) . . . . The only question then is the allocation of the expenses to this phase of the proceedings." [10] —— Ct. Cl., at ——, 290 F. 2d, at 947.

The Government does not question the amount or formula for the expense allocation made by the Court of Claims. Its sole contention here is that the court below misconceived the test governing § 23 (a)(2) deductions, in that the deductibility of these expenses turns, so it is argued, not upon the *consequences* to respondent of a

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[9] Section 24 (a)(1) provides: "In computing net income no deduction shall in any case be allowed in respect of—(1) Personal, living, or family expenses . . . ."

[10] Several other issues involving deficiency assessments for the years 1953, 1954, and 1955 were decided by the Court of Claims, but they are not before this Court.

failure to defeat his wife's community property claims but upon the *origin* and *nature* of the claims themselves. So viewing Dixie Gilmore's claims, whether relating to the existence or division of community property, it is contended that the expense of resisting them must be deemed nondeductible "personal" or "family" expense under § 24 (a)(1), not deductible expense under § 23 (a)(2). For reasons given hereafter we think the Government's position is sound and that it must be sustained.

I.

For income tax purposes Congress has seen fit to regard an individual as having two personalities: "one is [as] a seeker after profit who can deduct the expenses incurred in that search; the other is [as] a creature satisfying his needs as a human and those of his family but who cannot deduct such consumption and related expenditures." [11] The Government regards § 23 (a)(2) as embodying a category of the expenses embraced in the first of these roles.

Initially, it may be observed that the wording of § 23 (a)(2) more readily fits the Government's view of the provision than that of the Court of Claims. For in context "conservation of property" seems to refer to operations performed with respect to the property itself, such as safeguarding or upkeep, rather than to a taxpayer's retention of ownership in it.[12] But more illuminating than the mere language of § 23 (a)(2) is the history of the provision.

Prior to 1942 § 23 allowed deductions only for expenses incurred "in carrying on any trade or business," the deduction presently authorized by § 23 (a)(1). In *Higgins* v. *Commissioner*, 312 U. S. 212, this Court gave that pro-

[11] Surrey and Warren, Cases on Federal Income Taxation, 272 (1960).

[12] See 4 Mertens, Law of Federal Income Taxation (rev. ed. 1960), § 25A.09, at 19–20.

vision a narrow construction, holding that the activities of an individual in supervising his own securities investments did not constitute the "carrying on of a trade or business," and hence that expenses incurred in connection with such activities were not tax deductible. Similar results were reached in *United States* v. *Pyne,* 313 U. S. 127, and *City Bank Co.* v. *Helvering,* 313 U. S. 121. The Revenue Act of 1942 (56 Stat. 798, § 121), by adding what is now § 23 (a)(2), sought to remedy the inequity inherent in the disallowance of expense deductions in respect of such profit-seeking activities, the income from which was nonetheless taxable.[13]

As noted in *McDonald* v. *Commissioner,* 323 U. S. 57, 62, the purpose of the 1942 amendment was merely to enlarge "the category of incomes with reference to which expenses were deductible." And committee reports make clear that deductions under the new section were subject to the same limitations and restrictions that are applicable to those allowable under § 23 (a)(1).[14] Further, this Court has said that § 23 (a)(2) "is comparable and *in pari materia* with § 23 (a)(1)," providing for a class of deductions "coextensive with the business deductions allowed by § 23 (a)(1), except for" the requirement that the income-producing activity qualify as a trade or business. *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, 373, 374.

A basic restriction upon the availability of a § 23 (a)(1) deduction is that the expense item involved must be one that has a business origin. That restriction not only

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[13] See H. R. Rep. No. 2333, 77th Cong., 2d Sess. 46.

[14] H. R. Rep. No. 2333, 77th Cong., 2d Sess. 75: "A deduction under this section is subject, except for the requirement of being incurred in connection with a trade or business, to all the restrictions and limitations that apply in the case of the deduction under section 23 (a)(1)(A) of an expense paid or incurred in carrying on any trade or business." See also S. Rep. No. 1631, 77th Cong., 2d Sess. 88.

inheres in the language of § 23 (a)(1) itself, confining such deductions to "expenses . . . incurred . . . in carrying on any trade or business," but also follows from § 24 (a)(1), expressly rendering nondeductible "in any case . . . [p]ersonal, living, or family expenses." See note 9, *supra*. In light of what has already been said with respect to the advent and thrust of § 23 (a)(2), it is clear that the "[p]ersonal . . . or family expenses" restriction of § 24 (a)(1) must impose the same limitation upon the reach of § 23 (a)(2)—in other words that the only kind of expenses deductible under § 23 (a)(2) are those that relate to a "business," that is, profit-seeking, purpose. The pivotal issue in this case then becomes: was this part of respondent's litigation costs a "business" rather than a "personal" or "family" expense?

The answer to this question has already been indicated in prior cases. In *Lykes* v. *United States*, 343 U. S. 118, the Court rejected the contention that legal expenses incurred in contesting the assessment of a gift tax liability were deductible. The taxpayer argued that if he had been required to pay the original deficiency he would have been forced to liquidate his stockholdings, which were his main source of income, and that his legal expenses were therefore incurred in the "conservation" of income-producing property and hence deductible under § 23 (a)(2). The Court first noted that the "deductibility [of the expenses] turns wholly upon the nature of the activities to which they relate" (343 U. S., at 123), and then stated:

> "Legal expenses do not become deductible merely because they are paid for services which relieve a taxpayer of liability. That argument would carry us too far. It would mean that the expense of defending almost any claim would be deductible by a taxpayer on the ground that such defense was made to help him keep clear of liens whatever income-

producing property he might have. For example, it suggests that the expense of defending an action based upon personal injuries caused by a taxpayer's negligence while driving an automobile for pleasure should be deductible. Section 23 (a)(2) never has been so interpreted by us. . . .

"While the threatened deficiency assessment . . . added urgency to petitioner's resistance of it, neither its size nor its urgency determined its character. It related to the tax payable on petitioner's gifts . . . . The expense of contesting the amount of the deficiency was thus at all times attributable to the gifts, as such, and accordingly was not deductible.

"If, as suggested, the relative size of each claim, in proportion to the income-producing resources of a defendant, were to be a touchstone of the deductibility of the expense of resisting the claim, substantial uncertainty and inequity would inhere in the rule. . . . It is not a ground for . . . [deduction] that the claim, if justified, will consume income-producing property of the defendant." 343 U. S., at 125–126.

In *Kornhauser* v. *United States,* 276 U. S. 145, this Court considered the deductibility of legal expenses incurred by a taxpayer in defending against a claim by a former business partner that fees paid to the taxpayer were for services rendered during the existence of the partnership. In holding that these expenses were deductible even though the taxpayer was no longer a partner at the time of suit, the Court formulated the rule that "where a suit or action against a taxpayer is directly connected with, or . . . proximately resulted from, his business, the expense incurred is a business expense . . . ." 276 U. S., at 153. Similarly, in a case involving an expense incurred in satisfying an obligation (though not a litigation expense), it was said that "it is the origin of the

liability out of which the expense accrues" or "the kind of transaction out of which the obligation arose . . . which [is] crucial and controlling." *Deputy* v. *du Pont*, 308 U. S. 488, 494, 496.

The principle we derive from these cases is that the characterization, as "business" or "personal," of the litigation costs of resisting a claim depends on whether or not the claim *arises in connection with* the taxpayer's profit-seeking activities. It does not depend on the *consequences* that might result to a taxpayer's income-producing property from a failure to defeat the claim, for, as *Lykes* teaches, that "would carry us too far" [15] and would not be compatible with the basic lines of expense deductibility drawn by Congress.[16] Moreover, such a rule would lead to capricious results. If two taxpayers are each sued for an automobile accident while driving for pleasure, deductibility of their litigation costs would turn on the mere circumstance of the character of the assets each happened to possess, that is, whether the judgments against them stood to be satisfied out of income- or nonincome-producing property. We should be slow to attribute to Congress a purpose producing such unequal treatment among taxpayers, resting on no rational foundation.

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[15] The Treasury Regulations have long provided: "An expense (not otherwise deductible) paid or incurred by an individual in determining or contesting a liability asserted against him does not become deductible by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability." Treas. Reg. (1954 Code) § 1.212–1 (m); see Treas. Reg. 118 (1939 Code) § 39.23 (a)–15 (k).

[16] Expenses of contesting tax liabilities are now deductible under § 212 (3) of the 1954 Code. This provision merely represents a policy judgment as to a particular class of expenditures otherwise nondeductible, like extraordinary medical expenses, and does not cast any doubt on the basic tax structure set up by Congress.

Confirmation of these conclusions is found in the incongruities that would follow from acceptance of the Court of Claims' reasoning in this case. Had this respondent taxpayer conducted his automobile-dealer business as a sole proprietorship, rather than in corporate form, and claimed a deduction under § 23 (a)(1),[17] the potential impact of his wife's claims would have been no different than in the present situation. Yet it cannot well be supposed that § 23 (a)(1) would have afforded him a deduction, since his expenditures, made in connection with a marital litigation, could hardly be deemed "expenses . . . incurred . . . in carrying on any trade or business." Thus, under the Court of Claims' view expenses may be even less deductible if the taxpayer is carrying on a trade or business instead of some other income-producing activity. But it was manifestly Congress' purpose with respect to deductibility to place all income-producing activities on an equal footing. And it would surely be a surprising result were it now to turn out that a change designed to achieve equality of treatment in fact had served only to reverse the inequality of treatment.

For these reasons, we resolve the conflict among the lower courts on the question before us (note 4, *supra*) in favor of the view that the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was "business" or "personal" and hence whether it is deductible or not under § 23 (a)(2). We find the reasoning underlying the cases taking the "consequences" view unpersuasive.

*Baer* v. *Commissioner,* 196 F. 2d 646, upon which the Court of Claims relied in the present case, is the leading

[17] We find no indication that Congress intended § 23 (a)(2) to include such expenses.

authority on that side of the question.[18] There the Court of Appeals for the Eighth Circuit allowed a § 23 (a)(2) expense deduction to a taxpayer husband with respect to attorney's fees paid in a divorce proceeding in connection with an alimony settlement which had the effect of preserving intact for the husband his controlling stock interest in a corporation, his principal source of livelihood. The court reasoned that since the evidence showed that the taxpayer was relatively unconcerned about the divorce itself "[t]he controversy did not go to the question of . . . [his] liability [for alimony] [19] but to the manner in which . . . [that liability] might be met . . . without greatly disturbing his financial structure"; therefore the legal services were "for the purpose of conserving and maintaining" his income-producing property. 196 F. 2d, at 649–650, 651.

It is difficult to perceive any significant difference between the "question of liability" and "the manner" of its discharge, for in both instances the husband's purpose is to avoid losing valuable property. Indeed most of the cases which have followed *Baer* have placed little reliance on that distinction, and have tended to confine the deduction to situations where the wife's alimony claims, if successful, might have completely destroyed the husband's

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[18] Besides the present case see to the same effect, *e. g., Patrick* v. *United States,* 288 F. 2d 292 (C. A. 4th Cir.), No. 22, reversed today, *post,* p. 53; *Owens* v. *Commissioner,* 273 F. 2d 251 (C. A. 5th Cir.); *Bowers* v. *Commissioner,* 243 F. 2d 904 (C. A. 6th Cir.); *McMurtry* v. *United States,* 132 Ct. Cl. 418, 132 F. Supp. 114.

[19] Expenses incurred in divorce litigation have generally been held to be nondeductible. See, *e. g., Richardson* v. *Commissioner,* 234 F. 2d 248 (C. A. 4th Cir.); *Smith's Estate* v. *Commissioner,* 208 F. 2d 349 (C. A. 3d Cir.); *Joyce* v. *Commissioner,* 3 B. T. A. 393. See also Treas. Reg. (1954 Code) § 1.262–1 (b)(7): "Generally, attorney's fees and other costs paid in connection with a divorce, separation, or decree for support are not deductible by either the husband or the wife."

capacity to earn a living.[20] Such may be the situation where loss of control of a particular corporation is threatened, in contrast to instances where the impact of a wife's support claims is only upon diversified holdings of income-producing securities.[21] But that rationale too is unsatisfactory. For diversified security holdings are no less "property held for the production of income" than a large block of stock in a single company. And as was pointed out in *Lykes, supra,* at 126, if the relative impact of a claim on the income-producing resources of a taxpayer were to determine deductibility, substantial "uncertainty and inequity would inhere in the rule."

We turn then to the determinative question in this case: did the wife's claims respecting respondent's stockholdings arise in connection with his profit-seeking activities?

II.

In classifying respondent's legal expenses the court below did not distinguish between those relating to the claims of the wife with respect to the *existence* of community property and those involving the *division* of any such property. *Supra,* pp. 41–42. Nor is such a breakdown necessary for a disposition of the present case. It is enough to say that in both aspects the wife's claims stemmed entirely from the marital relationship, and not, under any tenable view of things, from income-producing activity. This is obviously so as regards the claim to more than an equal division of any community property

[20] See, *e. g.*, the present case, — Ct. Cl., at —, 290 F. 2d, at 947; *Tressler* v. *Commissioner,* 228 F. 2d 356, 361 (C. A. 9th Cir.); *Howard* v. *Commissioner,* 202 F. 2d 28, 30 (C. A. 9th Cir.).

[21] Compare, with the present case, *Davis* v. *United States,* 152 Ct. Cl. 805, 287 F. 2d 168, reversed in part on other grounds, 370 U. S. 65, in which the Court of Claims held to be nondeductible the legal expenses of resisting the wife's threat to stock not essential to protect the husband's employment.

found to exist. For any such right depended entirely on the wife's making good her charges of marital infidelity on the part of the husband. The same conclusion is no less true respecting the claim relating to the existence of community property. For no such property could have existed but for the marriage relationship.[22] Thus none of respondent's expenditures in resisting these claims can be deemed "business" expenses, and they are therefore not deductible under § 23 (a)(2).

In view of this conclusion it is unnecessary to consider the further question suggested by the Government: whether that portion of respondent's payments attributable to litigating the issue of the existence of community property was a capital expenditure or a personal expense. In neither event would these payments be deductible from gross income.

The judgment of the Court of Claims is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS believe that the Court reverses this case because of an unjustifiably narrow interpretation of the 1942 amendment to § 23 of the Internal Revenue Code and would accordingly affirm the judgment of the Court of Claims.

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[22] The respondent's attempted analogy of a marital "partnership" to the business partnership involved in the *Kornhauser* case, *supra*, is of course unavailing. The marriage relationship can hardly be deemed an income-producing activity.

## UNITED STATES v. PATRICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 22. Argued March 28, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued December 6, 1962.—Decided February 18, 1963.

Respondent sued for refund of part of the income tax paid by him for the year 1956, contending that certain legal fees paid by him to his attorneys and those representing his wife in connection with a property settlement incidental to divorce proceedings instituted by his wife were deductible under § 212 (2) of the Internal Revenue Code of 1954 as "ordinary and necessary expenses paid or incurred . . . for the management, conservation, or maintenance of property held for the production of income." He contended that the property settlement was designed to satisfy his marital obligations to his wife and protect the interests of their children and, at the same time, preserve his control over a newspaper publishing company to which he had devoted many years of effort. *Held:* Since the claims asserted by the wife in the divorce action arose from respondent's marital relationship with her and not from any profit-seeking activity, none of the legal fees paid by respondent is deductible as "business" expenses. *United States* v. *Gilmore*, *ante*, p. 39. Pp. 53–57.

288 F. 2d 292, reversed.

*Wayne G. Barnett* reargued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Richard J. Medalie, Melva M. Graney, Harold C. Wilkenfeld* and *Arthur I. Gould.*

*Robert M. Ward* reargued the cause and filed briefs for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents the question, similar to that decided today in No. 21, *United States* v. *Gilmore, ante,* p. 39, as to the deductibility of certain legal fees paid by the re-

spondent to his attorneys and attorneys representing his wife in connection with divorce proceedings instituted by the wife. In a suit for refund contesting the Commissioner's disallowance of such a deduction claimed in the taxpayer's 1956 federal income tax return, the United States District Court for the Western District of South Carolina held these expenses to be deductible under § 212 (2) of the Internal Revenue Code of 1954,[1] 186 F. Supp. 48, the Court of Appeals affirmed, 288 F. 2d 292, and we granted certiorari on the Government's petition, 368 U. S. 817.[2]

In 1955 respondent's wife [3] sued for divorce, alleging adultery on the part of her husband. Extended negotiations by the attorneys for both parties resulted in a property settlement agreement, and thereafter respondent filed his answer to the complaint neither admitting nor denying the allegations of adultery. Respondent did not testify at the trial. The South Carolina divorce court granted the wife an absolute divorce, approved the property settlement agreement, and in accordance therewith ordered respondent to pay the attorneys' fees for both parties.

At the time of these proceedings, respondent was president of the Herald Publishing Company in Rock Hill, South Carolina, and editor of the newspaper published by it. He owned 28% of the corporation's outstanding stock, his wife owned 28%, their oldest son, Hugh Patrick,

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[1] Section 212 provides, in pertinent part: "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year— . . . (2) for the management, conservation, or maintenance of property held for the production of income . . . ."

[2] This case was argued at the 1961 Term, and was restored to the calendar for reargument at this Term. 369 U. S. 835.

[3] Mr. Patrick will be referred to as the sole respondent. The administrator of the estate of his second wife is a party only because a joint return was filed. Respondent's former wife will be referred to as the "wife" notwithstanding the divorce.

owned 9%, and the remaining 35% was held in trusts for Hugh and the parties' two minor children. The real property on which the Herald Company was situated was owned by respondent and his wife, the former having an 80% undivided interest and the latter a 20% undivided interest. The couple also owned two houses. In addition, each independently owned diversified securities and other assets of substantial value.

The property settlement agreement recited that "by virtue of this agreement a final and lump settlement has been made of any and all rights whatsoever . . . concerning the matter of support, separate maintenance, alimony or any financial obligation of whatsoever sort due to [the wife] . . . on account of and growing out of the marital relationship of the parties . . . ." Besides provisions for the custody and support of the minor children and a provision giving one of the two houses to each of the parties, certain arrangements were made concerning the respective interests in the newspaper properties. Respondent delivered to his wife high-quality securities worth $112,000, the agreed value of her 28% of the publishing company stock, which she transferred to him subject to the condition that such stock should go to their three children in the event of his death or a sale of the entire business. A new long-term lease of the real property housing the newspaper was entered into with the corporation, and both parties then transferred their interests in this property to a trust, the income therefrom being payable to the wife for life and the remainder to pass in equal shares to the children. Finally, respondent agreed to pay all of his wife's attorneys' fees for services rendered in connection with the divorce and property settlement arrangements.

These fees, paid by respondent in 1956, amounted to $24,000—$12,000 to his attorneys and $12,000 to his wife's attorneys. The $24,000 total was allocated by agreement of counsel and the parties as follows: $4,000 for handling the divorce itself; $16,000 for rearranging the stock

interests in the publishing company; and $4,000 for leasing the real property and transferring it to a trust. Respondent claimed a deduction for the $16,000 item and for 80% of the $4,000 ($3,200) item relating to the business real estate.

Both courts below held that the entire $19,200 was deductible under § 212 (2) of the 1954 Code as an "ordinary and necessary [expense] paid or incurred . . . for the management, conservation, or maintenance of property held for the production of income." The Government's contention that this was a personal expense, nondeductible under § 262 of the Code,[4] was rejected. Relying on *Baer* v. *Commissioner,* 196 F. 2d 646, and cases following it (see No. 21, *ante,* pp. 49–51), the District Court and the Court of Appeals found that the fees were incurred not to resist a liability, but to arrange how it could be met without depriving the taxpayer of income-producing property, the loss of which would have destroyed his capacity to earn income. The property settlement provisions, so the lower courts held, were designed to satisfy respondent's marital obligations to his wife and protect the interests of the children, yet at the same time preserve respondent's control over the publishing company, to which he had devoted many years of effort.

The situation, in short, is comparable to that in *United States* v. *Gilmore, supra.* The principles held governing in that case are equally applicable here. It is evident that the claims asserted by the wife in the divorce action arose from respondent's marital relationship with her and were thus the product of respondent's personal or family life, not profit-seeking activity. As we have held in *Gilmore,* payments made for the purpose of discharging such claims are not deductible as "business" expenses.

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[4] Section 262 provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

We find no significant distinction in the fact that the legal fees for which deduction is claimed were paid for arranging a transfer of stock interests, leasing real property, and creating a trust rather than for conducting litigation. These matters were incidental to litigation brought by respondent's wife, whose claims arising from respondent's personal and family life were the origin of the property arrangements. The property settlement agreement itself recited that it settled rights "growing out of the marital relationship," *supra,* p. 55, and both courts below found that, although nominally an agreement for the purchase of the wife's property, it served ultimately to protect respondent's income-producing property from an assertion of his wife's latent marital rights. It would be unsound to make deductibility turn on the nature of the measures taken to forestall a claim rather than the source of the claim itself.

As in the *Gilmore* case, we need not pass on the Government's alternative contention that part of the legal fees sought to be deducted here are not expenses at all, but rather are capital outlays. Since we hold that the payments were not deductible as "business" expenses, it makes no difference for present purposes whether they are personal expenses or capital expenditures; in either case they would not be deductible.[5]

We conclude that none of the legal fees paid by respondent is deductible, and the judgment of the Court of Appeals is accordingly

*Reversed.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

[5] In view of our conclusion that the legal fees were not "business" expenses, we do not reach the Government's second alternative contention that at least the fees paid by respondent to his wife's attorneys were not deductible under prior decisions of this Court. See, *e. g., Magruder* v. *Supplee,* 316 U. S. 394; *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590.

## BANTAM BOOKS, INC., ET AL. *v.* SULLIVAN ET AL.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND.

No. 118. Argued December 3–4, 1962.—Decided February 18, 1963.

The Rhode Island Legislature created a Commission "to educate the public concerning any book . . . or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined [in other sections] and to investigate and recommend the prosecution of all violations of said sections." The Commission's practice was to notify a distributor that certain books or magazines distributed by him had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age. Such notices requested the distributor's "cooperation" and advised him that copies of the lists of "objectionable" publications were circulated to local police departments and that it was the Commission's duty to recommend prosecution of purveyors of obscenity. Four out-of-state publishers of books widely distributed in the State sued in a Rhode Island court for injunctive relief and a declaratory judgment that the law and the practices thereunder were unconstitutional. The court found that the effect of the Commission's notices was to intimidate distributors and retailers and that they had resulted in the suppression of the sale of the books listed. In this Court, the State Attorney General conceded that the notices listed several publications that were not obscene within this Court's definition of the term. *Held:* The system of informal censorship disclosed by this record violates the Fourteenth Amendment. Pp. 59–72.

(a) The Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. Pp. 65–66.

(b) Although the Rhode Island Commission is limited to informal sanctions, the record amply demonstrates that it deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim. Pp. 66–67.

(c) The acts and practices of the members and Executive Secretary of the Commission were performed under color of state law

and so constituted acts of the State within the meaning of the Fourteenth Amendment. P. 68.

(d) The Commission's practice provides no safeguards whatever against the suppression of nonobscene and constitutionally protected matter; and it is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon criminal sanctions, which may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. Pp. 68–70.

(e) What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints without any provision for notice and hearing before publications are listed as "objectionable" and without any provision for judicial review of the Commission's determination that such publications are "objectionable." Pp. 70–72.

Reversed and cause remanded.

*Horace S. Manges* argued the cause for appellants. With him on the briefs were *Jacob F. Raskin* and *Milton Stanzler.*

*J. Joseph Nugent,* Attorney General of Rhode Island, argued the cause for appellees. With him on the brief was *Joseph L. Breen.*

*Irwin Karp* filed a brief for the Authors League of America, Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Rhode Island Legislature created the "Rhode Island Commission to Encourage Morality in Youth," whose members and Executive Secretary are the appellees herein, and gave the Commission *inter alia* ". . . the duty . . . to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as de-

fined in sections 13, 47, 48 and 49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections . . . ." [1] The appellants brought this action in

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[1] Resolution No. 73 H 1000, R. I. Acts and Resolves, January Session 1956, 1102–1103. The resolution created a "commission to encourage morality in youth," to be composed of nine members appointed by the Governor of the State. The members were to serve for staggered, five-year terms. They were to receive no compensation, but their expenses, as well as the expenses incurred in the operation of the Commission generally, were to be defrayed out of annual appropriations. The original mandate of the Commission was superseded in part by Resolution No. 95 S 444, R. I. Acts and Resolves, January Session 1959, 880, which reads as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11–31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

The Commission's activities are not limited to the circulation of lists of objectionable publications. For example, the annual report of the Commission issued in January 1960, recites in part:

"In September, 1959, because of the many complaints from outraged parents at the type of films being shown at the Rhode Island Drive-Ins and also the lack of teen-age supervision while parked, this Commission initiated and completed a survey on the Drive-In Theatres in the State. High points of the survey note that there are II (2) Drive-in theatres in Rhode Island which operate through summer months and remain open until November and then for weekends during the winter, providing car-heaters.

. . . . . .

"Acting on its power to investigate causes of delinquency, the Commission has met with several state officials for a discussion of juvenile

the Superior Court of Rhode Island (1) to declare the law creating the Commission in violation of the First and Fourteenth Amendments, and (2) to declare unconstitutional and enjoin the acts and practices of the appellees thereunder. The Superior Court declined to declare the law creating the Commission unconstitutional on its face but granted the appellants an injunction against the acts and practices of the appellees in performance of their duties. The Supreme Court of Rhode Island affirmed the Superior Court with respect to appellants' first prayer but reversed the grant of injunctive relief. — R. I. —, 176 A. 2d 393 (1961).[2] Appellants brought this appeal and we noted probable jurisdiction, 370 U. S. 933.[3]

Appellants are four New York publishers of paperback books which have for sometime been widely distributed in Rhode Island. Max Silverstein & Sons is the exclusive wholesale distributor of appellants' publications throughout most of the State. The Commission's practice has been to notify a distributor on official Commission stationery that certain designated books or magazines distributed by him had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age. Silverstein had received at least 35 such notices at the time this suit was brought. Among

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drinking, the myriad and complex causes of delinquency, and legal aspects of the Commission's operations. It also held a special meeting with Rhode Island police and legal officials in September, 1959, for a discussion on the extent of delinquency in Rhode Island and the possible formation of state-wide organization to combat it."

[2] The action was brought pursuant to Title 9, c. 30, Gen. Laws R. I., 1956 ed., as amended (Uniform Declaratory Judgments Act).

[3] Our appellate jurisdiction is properly invoked, since the state court judgment sought to be reviewed upheld a state statute against the contention that, on its face and as applied, the statute violated the Federal Constitution. 28 U. S. C. § 1257 (2). *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

the paperback books listed by the Commission as "objectionable" were one published by appellant Dell Publishing Co., Inc., and another published by appellant Bantam Books, Inc.[4]

The typical notice to Silverstein either solicited or thanked Silverstein, in advance, for his "cooperation" with the Commission, usually reminding Silverstein of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity.[5] Copies of the

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[4] Peyton Place, by Grace Metalious, published (in paperback edition) by appellant Dell Publishing Co., Inc.; The Bramble Bush, by Charles Mergendahl, published (in paperback edition) by appellant Bantam Books, Inc. Most of the other 106 publications which, as of January 1960, had been listed as objectionable by the Commission were issues of such magazines as "Playboy," "Rogue," "Frolic," and so forth. The Attorney General of Rhode Island described some of the 106 publications as "horror" comics which he said were not obscene as this Court has defined the term.

[5] The first notice received by Silverstein reads, in part, as follows:

"This agency was established by legislative order in 1956 with the immediate charge to prevent the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.

"The Commissions [*sic*] have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths and [*sic*] eighteen years of age.

. . . . . .

"The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.

"The Attorney General will act for us in case of non-compliance.

"The Commissioners trust that you will cooperate with this agency in their work. . . .

"Another list will follow shortly.

"Thanking you for your anticipated cooperation, I am,

"Sincerely yours

"Albert J. McAloon

"Executive Secretary"

[*Footnote 5 continued on p. 63*]

lists of "objectionable" publications were circulated to local police departments, and Silverstein was so informed in the notices.

Silverstein's reaction on receipt of a notice was to take steps to stop further circulation of copies of the listed publications. He would not fill pending orders for such publications and would refuse new orders. He instructed his field men to visit his retailers and to pick up all unsold copies, and would then promptly return them to the publishers. A local police officer usually visited Silverstein shortly after Silverstein's receipt of a notice to learn what action he had taken. Silverstein was usually able to inform the officer that a specified number of the total of copies received from a publisher had been returned. According to the testimony, Silverstein acted as he did on receipt of the notice "rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply." His "cooperation" was given to avoid becoming involved in a "court proceeding" with a "duly authorized organization."

The Superior Court made fact findings and the following two, supported by the evidence and not rejected by the Supreme Court of Rhode Island, are particularly relevant:

> "8. The effect of the said notices [those received by Silverstein, including the two listing publications

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Another notice received by Silverstein reads in part:

"This list should be used as a guide in judging other similar publications not named.

"Your cooperation in removing the listed and other objectionable publications from your newstands [*sic*] will be appreciated. Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."

An undated "News Letter" sent to Silverstein by the Commission reads in part: "The lists [of objectionable publications] have been sent to distributors and police departments. To the present cooperation has been gratifying."

> of appellants] were [*sic*] clearly to intimidate the various book and magazine wholesale distributors and retailers and to cause them, by reason of such intimidation and threat of prosecution, (a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers.
>
> "9. The activities of the Respondents [appellees here] have resulted in the suppression of the sale and circulation of the books listed in said notices . . . ."

In addition to these findings it should be noted that the Attorney General of Rhode Island conceded on oral argument in this Court that the books listed in the notices included several that were not obscene within this Court's definition of the term.

Appellants argue that the Commission's activities under Resolution 73, as amended, amount to a scheme of governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity, and thus abridge First Amendment liberties, protected by the Fourteenth Amendment from infringement by the States. We agree that the activities of the Commission are unconstitutional and therefore reverse the Rhode Island court's judgment and remand the case for further proceedings not inconsistent with this opinion.[6]

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[6] Appellants' standing has not been, nor could it be, successfully questioned. The appellants have in fact suffered a palpable injury as a result of the acts alleged to violate federal law, and at the same time their injury has been a legal injury. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 151–152 (concurring opinion). The finding that the Commission's notices impaired sales of the listed publications, which include two books published by appellants, establishes that appellants suffered injury. It was a legal injury, although more needs be said to demonstrate this. The Commisson's notices were circulated only to distributors and not, so far

We held in *Alberts* v. *California*, decided with *Roth* v. *United States*, 354 U. S. 476, 485, that "obscenity is not within the area of constitutionally protected speech or press" and may therefore be regulated by the States. But this principle cannot be stated without an important qualification:

> ". . . [I]n *Roth* itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat

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as appears, to publishers. The Commission purports only to regulate distribution; it has made no claim to having jurisdiction of out-of-state publishers. However, if this were a private action, it would present a claim, plainly justiciable, of unlawful interference in advantageous business relations. *American Mercury, Inc.*, v. *Chase*, 13 F. 2d 224 (D. C. D. Mass. 1926). Cf. 1 Harper and James, Torts (1956), §§ 6.11–6.12. See also *Pocket Books, Inc.*, v. *Walsh*, 204 F. Supp. 297 (D. C. D. Conn. 1962). It makes no difference, so far as appellants' standing is concerned, that the allegedly unlawful interference here is the product of state action. See *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Truax* v. *Raich*, 239 U. S. 33; *Terrace* v. *Thompson*, 263 U. S. 197, 214–216; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 422–423. Furthermore, appellants are not in the position of mere proxies arguing another's constitutional rights. The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication, *Lovell* v. *Griffin*, 303 U. S. 444, 452, and the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants. Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459.

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> sex in a manner appealing to prurient interest.' [354 U. S., at 488] . . . . It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant,* 367 U. S. 717, 730–731.

Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith* v. *California,* 361 U. S. 147; *Marcus* v. *Search Warrant, supra,* is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, *e. g., Thornhill* v. *Alabama,* 310 U. S. 88; *Winters* v. *New York,* 333 U. S. 507; *NAACP* v. *Button,* 371 U. S. 415. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser* v. *Randall,* 357 U. S. 513, 525.

But, it is contended, these salutary principles have no application to the activities of the Rhode Island Commission because it does not regulate or suppress obscenity but simply exhorts booksellers and advises them of their legal rights. This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not

been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim.[7] We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.[8]

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[7] For discussions of the problem of "informal censorship," see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 6–9 and n. 7–22 (1960); Note, Extralegal Censorship of Literature, 33 N. Y. U. L. Rev. 989 (1958); Note, Entertainment: Public Pressures and the Law, 71 Harv. L. Rev. 326, 344–347 (1957); Note, Regulation of Comic Books, 68 Harv. L. Rev. 489, 494–499 (1955); Comment, Censorship of Obscene Literature by Informal Governmental Action, 22 Univ. of Chi. L. Rev. 216 (1954); Lockhart and McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 309–316 (1954).

[8] Threats of prosecution or of license revocation, or listings or notifications of supposedly obscene or objectionable publications or motion pictures, on the part of chiefs of police or prosecutors, have been enjoined in a number of cases. See *Kingsley International Pictures Corp.* v. *Blanc*, 396 Pa. 448, 153 A. 2d 243 (1959); *Bunis* v. *Conway*, 17 App. Div. 2d 207, 234 N. Y. S. 2d 435 (1962) (*dictum*); *Sunshine Book Co.* v. *McCaffrey*, 4 App. Div. 2d 643, 168 N. Y. S. 2d 268 (1957); *Random House, Inc.*, v. *Detroit*, No. 555684 Chancery, Cir. Ct., Wayne County, Mich., March 29, 1957; *HMH Publishing Co.* v. *Garrett*, 151 F. Supp. 903 (D. C. N. D. Ind. 1957); *New American Library of World Literature* v. *Allen*, 114 F. Supp. 823 (D. C. N. D. Ohio 1953); *Bantam Books, Inc.*, v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47 (Chancery 1953), modified on other grounds, 14 N. J. 524, 103 A. 2d 256 (1954); *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479 (D. C. N. D. Ohio 1921);

It is not as if this were not regulation by the State of Rhode Island. The acts and practices of the members and Executive Secretary of the Commission disclosed on this record were performed under color of state law and so constituted acts of the State within the meaning of the Fourteenth Amendment. *Ex parte Young*, 209 U. S. 123. Cf. *Terry* v. *Adams*, 345 U. S. 461. These acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island. It is true, as noted by the Supreme Court of Rhode Island, that Silverstein was "free" to ignore the Commission's notices, in the sense that his refusal to "cooperate" would have violated no law. But it was found as a fact—and the finding, being amply supported by the record, binds us—that Silverstein's compliance with the Commission's directives was not voluntary. People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when

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*Epoch Producing Corp.* v. *Davis*, 19 Ohio N. P. (N. S.) 465 (C. P. 1917). Cf. *In re Louisiana News Co.*, 187 F. Supp. 241 (D. C. E. D. La. 1960); *Roper* v. *Winner*, 244 S. W. 2d 355, 357 (Tex. Civ. App. 1951); *American Mercury, Inc.*, v. *Chase*, 13 F. 2d 224 (D. C. D. Mass. 1926). Relief has been denied in the following cases: *Pocket Books, Inc.*, v. *Walsh*, 204 F. Supp. 297 (D. C. D. Conn. 1962); *Dell Publishing Co.* v. *Beggans*, 110 N. J. Eq. 72, 158 A. 765 (Chancery 1932). See also *Magtab Publishing Corp.* v. *Howard*, 169 F. Supp. 65 (D. C. W. D. La. 1959). None of the foregoing cases presents the precise factual situation at bar, and we intimate no view one way or the other as to their correctness.

they plainly serve as instruments of regulation independent of the laws against obscenity.[9] Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State

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[9] We note that the Commission itself appears to have understood its function as the proscribing of objectionable publications, and not merely the giving of legal advice to distributors. See the first notice received by Silverstein, quoted in note 5, *supra*. The minutes of one of the Commission's meetings read in part:

". . . Father Flannery [a member of the Commission] noted that he had been called about magazines proscribed by the Commission remaining on sale after lists had been *scent* [*sic*] to distributors and police, to which Mr. McAloon suggested that it could be that the same magazines were seen, but that it probably was not the same edition proscribed by the Commission.

"Father Flannery questioned the state-wide compliance by the police, or anyone else, to get the proscribed magazines off the stands. Mr. McAloon showed the Commissioners the questionnaires sent to the chiefs of police from this office and returned to us."

The minutes of another meeting read in part:

". . . Mr. Sullivan [member of the Commission] suggested calling the Cranston Chief of Police to inquire the reason Peyton Place was still being sold, distributed and displayed since the Police departments had been advised of the Commission's vote."

Of course, it is immaterial whether in carrying on the function of censor, the Commission may have been exceeding its statutory authority. Its acts would still constitute state action. *Ex parte Young*, 209 U. S. 123. The issue of statutory authority was not raised or argued in this litigation.

Our holding that the scheme of informal censorship here constitutes state action is in no way inconsistent with *Standard Computing Scale Co.* v. *Farrell*, 249 U. S. 571. In that case it was held that a bulletin of specifications issued by the State Superintendent of Weights and Measures could not be deemed state action for Fourteenth Amendment purposes because the bulletin was purely advisory; the decision turned on the fact that the bulletin was not coercive in purport.

has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.

What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. See *Near* v. *Minnesota,* 283 U. S. 697; *Lovell* v. *Griffin,* 303 U. S. 444, 451; *Schneider* v. *State,* 308 U. S. 147, 164; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306; *Niemotko* v. *Maryland,* 340 U. S. 268, 273; *Kunz* v. *New York,* 340 U. S. 290, 293; *Staub* v. *Baxley,* 355 U. S. 313, 321. We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.[10] *Kingsley*

[10] Nothing in the Court's opinion in *Times Film Corp.* v. *Chicago,* 365 U. S. 43, is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional *per se,* the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures.

*Books, Inc.*, v. *Brown*, 354 U. S. 436. The system at bar includes no such saving features. On the contrary, its capacity for suppression of constitutionally protected publications is far in excess of that of the typical licensing scheme held constitutionally invalid by this Court. There is no provision whatever for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness. The publisher or distributor is not even entitled to notice and hearing before his publications are listed by the Commission as objectionable. Moreover, the Commission's statutory mandate is vague and uninformative, and the Commission has done nothing to make it more precise. Publications are listed as "objectionable" without further elucidation. The distributor is left to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality. For the Commission's domain is the whole of youthful morals. Finally, we note that although the Commission's supposed concern is limited to youthful readers, the "cooperation" it seeks from distributors invariably entails the complete suppression of the listed publications; adult readers are equally deprived of the opportunity to purchase the publications in the State. Cf. *Butler* v. *Michigan*, 352 U. S. 380.

The procedures of the Commission are radically deficient. They fall far short of the constitutional requirements of governmental regulation of obscenity. We hold that the system of informal censorship disclosed by this record violates the Fourteenth Amendment.

In holding that the activities disclosed on this record are constitutionally proscribed, we do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating

valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms. But that is not this case. The appellees are not law enforcement officers; they do not pretend that they are qualified to give or that they attempt to give distributors only fair legal advice. Their conduct as disclosed by this record shows plainly that they went far beyond advising the distributors of their legal rights and liabilities. Their operation was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress.

*Reversed and remanded.*

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I adhere to the views I expressed in *Roth* v. *United States*, 354 U. S. 476, 508–514, respecting the very narrow scope of governmental authority to suppress publications on the grounds of obscenity. Yet as my Brother BRENNAN makes clear, the vice of Rhode Island's system is apparent whatever one's view of the constitutional status of "obscene" literature. This is censorship in the raw; and in my view the censor and First Amendment rights are incompatible. If a valid law has been violated, authors and publishers and vendors can be made to account. But they would then have on their side all the procedural safeguards of the Bill of Rights, including trial by jury. From the viewpoint of the State that is a more cumbersome procedure, action on the majority vote of the censors being far easier. But the Bill of Rights was designed to fence in the Government

and make its intrusions on liberty difficult and its interference with freedom of expression well-nigh impossible.

All nations have tried censorship and only a few have rejected it. Its abuses mount high. Today Iran censors news stories in such a way as to make false or misleading some reports of reputable news agencies. For the Iranian who writes the stories and lives in Teheran goes to jail if he tells the truth. Thus censorship in Teheran has as powerful extralegal sanctions as censorship in Providence.

The Providence regime is productive of capricious action. A five-to-four vote makes a book "obscene." The wrong is compounded when the issue, though closely balanced in the minds of sophisticated men, is resolved against freedom of expression and on the side of censorship. Judges, to be sure, often disagree as to the definition of obscenity. But an established administrative system that bans book after book, even though they muster four votes out of nine, makes freedom of expression much more precarious than it would be if unanimity were required. This underlines my Brother BRENNAN'S observation that the Providence regime "provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter." Doubts are resolved against, rather than for, freedom of expression.

The evils of unreviewable administrative action of this character are as ancient as dictators. George Kennan, Siberia and the Exile System (U. of Chi. 1958) p. 60, gives insight into it:

> "Mr. Boródin, another Russian author and a well-known contributor to the Russian magazine *Annals of the Fatherland,* was banished to the territory of Yakútsk on account of the alleged 'dangerous' and 'pernicious' character of a certain manuscript found in his house by the police during a search. This

> manuscript was a spare copy of an article upon the economic condition of the province of Viátka, which Mr. Boródin had written and sent to the above-named magazine, but which, up to that time, had not been published. The author went to Eastern Siberia in a convict's gray overcoat with a yellow ace of diamonds on his back, and three or four months after his arrival in Yakútsk he had the pleasure of reading in the *Annals of the Fatherland* the very same article for which he had been exiled. The Minister of the Interior had sent him to Siberia merely for having in his possession what the police called a 'dangerous' and 'pernicious' manuscript, and then the St. Petersburg committee of censorship had certified that another copy of that same manuscript was perfectly harmless, and had allowed it to be published, without the change of a line, in one of the most popular and widely circulated magazines in the empire."

Thus under the Czars an all-powerful elite condemned to the Siberia of that day an author whom a minority applauded. Administrative fiat is as dangerous today as it was then.

MR. JUSTICE CLARK, concurring in the result.

As I read the opinion of the Court, it does much fine talking about freedom of expression and much condemning of the Commission's overzealous efforts to implement the State's obscenity laws for the protection of Rhode Island's youth but, as if shearing a hog, comes up with little wool. In short, it creates the proverbial tempest in a teapot over a number of notices sent out by the Commission asking the cooperation of magazine distributors in preventing the sale of obscene literature to juveniles.

The storm was brewed from certain inept phrases in the notices wherein the Commission assumed the prerogative of issuing an "order" to the police that certain publications which it deemed obscene are "not to be sold, distributed or displayed to youths under eighteen years of age" and stated that "[t]he Attorney General will act for us in case of non-compliance." But after all this expostulation the Court, being unable to strike down Rhode Island's statute, see *Alberts* v. *California*, 354 U. S. 476 (1957), drops a demolition bomb on "the Commission's practice" without clearly indicating what might be salvaged from the wreckage. The Court in condemning the Commission's practice owes Rhode Island the duty of articulating the standards which must be met, lest the Rhode Island Supreme Court be left at sea as to the appropriate disposition on remand.

In my view the Court should simply direct the Commission to abandon its delusions of grandeur and leave the issuance of "orders" to enforcement officials and "the State's criminal regulation of obscenity" to the prosecutors, who can substitute prosecution for "thinly veiled threats" in appropriate cases. See *Alberts* v. *California*, *supra*. As I read the opinion this is the extent of the limitations contemplated by the Court, leaving the Commission free, as my Brother HARLAN indicates, to publicize its findings as to the obscene character of any publication; to solicit the support of the public in preventing obscene publications from reaching juveniles; to furnish its findings to publishers, distributors and retailers of such publications and to law enforcement officials; and, finally, to seek the aid of such officials in prosecuting offenders of the State's obscenity laws. This Court has long recognized that "the primary requirements of decency may be enforced against obscene publications." *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931); see *Kingsley Books, Inc.*,

v. *Brown*, 354 U. S. 436 (1957). Certainly in the face of rising juvenile crime and lowering youth morality the State is empowered consistent with the Constitution to use the above procedures in attempting to dispel the defilement of its youth by obscene publications. With this understanding of the Court's holding I join in its judgment, believing that the limitations as outlined would have little bearing on the efficacy of Rhode Island's law.

MR. JUSTICE HARLAN, dissenting.

The Court's opinion fails to give due consideration to what I regard as the central issue in this case—the accommodation that must be made between Rhode Island's concern with the problem of juvenile delinquency and the right of freedom of expression assured by the Fourteenth Amendment.

Three reasons, as I understand the Court's opinion, are given for holding the particular procedures adopted by the Rhode Island Commission under this statute, though not the statute itself, unconstitutional: (1) the Commission's activities, carried on under color of state law, amount to a scheme of governmental censorship; (2) its procedures lack adequate safeguards to protect nonobscene material against suppression; and (3) the group's operations in the field of youth morality may entail depriving the adult public of access to constitutionally protected material.

In my opinion, none of these reasons is of overriding weight in the context of what is obviously not an effort by the State to obstruct free expression but an attempt to cope with a most baffling social problem.

I.

This Rhode Island Commission was formed for the laudable purpose of combatting juvenile delinquency. While there is as yet no consensus of scientific opinion on the

causal relationship between youthful reading or viewing of "the obscene" and delinquent behavior, see Green, Obscenity, Censorship, and Juvenile Delinquency, 14 U. of Toronto L. J. 229 (1962), Rhode Island's approach to the problem is not without respectable support, see S. Rep. No. 2381, 84th Cong., 2d Sess. (1956); Kefauver, Obscene and Pornographic Literature and Juvenile Delinquency, 24 Fed. Prob. No. 4, p. 3 (Dec. 1960). The States should have a wide range of choice in dealing with such problems, *Alberts* v. *California,* decided with *Roth* v. *United States,* 354 U. S. 476 (separate opinion of the writer, at 500–502), and this Court should not interfere with state legislative judgments on them except upon the clearest showing of unconstitutionality.

I can find nothing in this record that justifies the view that Rhode Island has attempted to deal with this problem in an irresponsible way. I agree with the Court that the tenor of some of the Commission's letters and reports is subject to serious criticism, carrying as they do an air of authority which that body does not possess and conveying an impression of consequences which by no means may follow from noncooperation with the Commission. But these are things which could surely be cured by a word to the wise. They furnish no occasion for today's opaque pronouncements which leave the Commission in the dark as to the permissible constitutional scope of its future activities.

Given the validity of state obscenity laws, *Alberts* v. *California, supra,* I think the Commission is constitutionally entitled (1) to express its views on the character of any published reading or other material; (2) to endeavor to enlist the support of law enforcement authorities, or the cooperation of publishers and distributors, with respect to any material the Commission deems obscene; and (3) to notify publishers, distributors, and members of the public

with respect to its activities in these regards; but that it must take care to refrain from the kind of overbearing utterances already referred to and others that might tend to give any person an erroneous impression as to either the extent of the Commission's authority or the consequences of a failure to heed its warnings. Since the decision of the Court does not require reinstatement of the broad injunction issued by the trial court,[1] and since the majority's opinion rests on the invalidity of the particular procedures the Commission has pursued, I find nothing in that opinion denying the Commission the right to conduct the activities, just enumerated, which I believe it is constitutionally entitled to carry on.

## II.

It is said that the Rhode Island procedures lack adequate safeguards against the suppression of the non-obscene, in that the Commission may pronounce publications obscene without any prior judicial determination or review. But the Commission's pronouncement in any given instance is not self-executing. Any affected distributor or publisher wishing to stand his ground on a particular publication may test the Commission's views by way of a declaratory judgment action [2] or suit for injunctive relief or by simply refusing to accept the Com-

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[1] The appellees were enjoined "from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction . . . [to] apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins."

[2] Rhode Island Gen. Laws (Supp. 1961), Tit. 9, c. 30 (Uniform Declaratory Judgments Act).

mission's opinion and awaiting criminal prosecution in respect of the questioned work.

That the Constitution requires no more is shown by this Court's decision in *Times Film Corp.* v. *Chicago,* 365 U. S. 43. There the petitioner refused to comply with a Chicago ordinance requiring that all motion pictures be examined and licensed by a city official prior to exhibition. It was contended that regardless of the obscenity *vel non* of any particular picture and the licensing standards employed, this requirement in itself amounted to an unconstitutional prior restraint on free expression. Stating that there is no "absolute freedom to exhibit, at least once, any and every kind of motion picture," 365 U. S., at 46, this Court rejected that contention and remitted the petitioner to a challenge of an application of the city ordinance to specific films. The Court thus refused to countenance a "broadside attack" on a system of regulation designed to prevent the dissemination of obscene matter.

Certainly with respect to a sophisticated publisher or distributor,[3] and shorn of embellishing mandatory language, this Commission's advisory condemnation of particular publications does not create as great a danger of restraint on expression as that involved in *Times Film,* where exhibition of a film without a license was made a crime.[4] Nor can such danger be regarded as greater than that involved in the preadjudication impact of the sequestration procedures sustained by this Court in *Kingsley Books, Inc.,* v. *Brown,* 354 U. S. 436. For

[3] The publishers and distributors involved in this case are all, so far as this record shows, substantial business concerns, presumably represented by competent counsel, as were the appellants here.

[4] It seems obvious that in a nonlicensing context the force of *Times Film* is not lessened by the circumstance that in this case books rather than motion pictures are involved.

here the Commission's action is attended by no legal sanctions and leaves distribution of the questioned material entirely undisturbed.

This case bears no resemblance to what the Court refused to sanction in *Marcus* v. *Search Warrant of Property,* 367 U. S. 717. There police officers, pursuant to Missouri procedures, seized in a one-day foray under search warrants some 11,000 copies of 280 publications found at the appellants' various places of business and believed by the officers to be obscene. The state court later found that only 100 out of the 280 publications actually were obscene. In holding "that Missouri's procedures as applied . . . lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled," 367 U. S., at 731, the Court emphasized the historical connection between the search and seizure power and the stifling of liberty of expression. The Missouri warrants gave the broadest discretion to each executing officer and left to his *ad hoc* judgment on the spot, with little or no opportunity for discriminating deliberation, which publications should be seized as obscene. Since "there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity," 367 U. S., at 732, it was to be expected that much of the material seized under these procedures would turn out not to be obscene, as indeed was later found by the state court in that very case.

No such hazards to free expression exist in the procedures I regard as permissible in the present case. Of cardinal importance, dissemination of a challenged publication is not physically or legally impeded in any way. Furthermore, the advisory condemnations complained of are the product not of hit-or-miss police action but of a deliberative body whose judgments are limited by stand-

ards embraced in the State's general obscenity statute, the constitutionality of which is not questioned in this case.

The validity of the foregoing considerations is not, in my opinion, affected by the state court findings that one of appellants' distributors was led to withdraw publications, thought obscene by the Commission, because of fear of criminal prosecution. For this record lacks an element without which those findings are not of controlling constitutional significance in the context of the competing state and individual interests here at stake: there is no showing that Rhode Island has put any roadblocks in the way of any distributor's or publisher's recourse to the courts to test the validity of the Commission's determination respecting any publication, or that the purpose of these procedures was to stifle freedom of expression.

It could not well be suggested, as I think the Court concedes, that a prosecutor's announcement that he intended to enforce strictly the obscenity laws or that he would proceed against a particular publication unless withdrawn from circulation amounted to an unconstitutional restraint upon freedom of expression, still less that such a restraint would occur from the mere existence of a criminal obscenity statute. Conceding that the restrictive effect of the Commission's procedures on publishers, and *a fortiori* on independent distributors, may be greater than in either of those situations, I do not believe that the differences are of constitutional import, in the absence of either of the two factors indicated in the preceding paragraph. The circumstance that places the Commission's permissible procedures on the same constitutional level as the illustrations just given is the fact that in each instance the courts are open to the person affected, and that any material, however questionable, may be freely sponsored, circulated, read, or viewed until judicially condemned.

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In essence what the Court holds is that these publishers or their distributors need not, with respect to any material challenged by the Commission, vindicate their right to its protection in order to bring the Constitution to their aid. The effect of this holding is to cut into this effort of the State to get at the juvenile delinquency problem, without this Court or any other ever having concretely focused on whether any of the specific material called in question by the Commission is or is not entitled to protection under constitutional standards established by our decisions.[5]

This seems to me to weight the accommodation which should be made between the competing interests that this case presents entirely against the legitimate interests of the State. I believe that the correct course is to refuse to countenance this "broadside attack" on these state procedures and, with an appropriate *caveat* as to the character of some of the Commission's past utterances, to remit the appellants to their remedies respecting particular publications challenged by the Commission, as was done in the *Times Film* case. Putting these publishers and their distributors to the pain of vindicating challenged materials is not to place them under unusual hardship, for as this Court has said in another context, "Bearing the discomfiture and cost" even of "a prosecution for crime . . . [though] by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States,* 309 U. S. 323, 325.

## III.

The Court's final point—that the Commission's activities may result in keeping from the adult public protected material, even though suppressible so far as youth is con-

[5] In their Reply Brief (p. 4) appellants acknowledge: "We have never attempted to deal with the question of obscenity or non-obscenity of Appellants' books."

cerned—requires little additional comment. It is enough to say that such a determination should not be made at large, as has been done here. It should await a case when circumspect judgment can be brought to bear upon particular judicially suppressed publications.

Believing that the Commission, once advised of the permissible constitutional scope of its activities, can be counted on to conduct itself accordingly, I would affirm the judgment of the Rhode Island Supreme Court. Cf. *United States* v. *Haley*, 371 U. S. 18.

# NORTHERN NATURAL GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 62. Argued December 13, 1962.—
Decided February 18, 1963.

Orders of the Kansas State Corporation Commission which require appellant, an interstate pipeline company, to purchase natural gas ratably from all wells connecting with its pipeline system in each gas field in the State *held* invalid, because they invade the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale. Pp. 85–98.

(a) Since appellant is not a producer of gas but a purchaser of gas from producers, it cannot be said that the orders here involved constitute only state regulation of the "production or gathering" of natural gas, which is exempted from the federal regulatory domain by § 1 (b) of the Natural Gas Act. Pp. 89–90.

(b) Since these orders are directed at wholesale purchasers of natural gas in Kansas and, subject to criminal sanctions for noncompliance, require them to balance the output of all wells within the State from which they take, they necessarily threaten the ability of the Federal Power Commission to regulate comprehensively and uniformly the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers in other States. Pp. 90–93.

(c) These orders cannot be sustained on the ground that they merely conserve scarce natural resources. Although conservation is a legitimate objective of state regulation, it cannot be effectuated by means such as these which encroach upon a federally preempted regulatory domain. Pp. 93–96.

(d) This Court rejects a suggestion that the case should be remanded to the Kansas Supreme Court in order that that Court might construe the orders as relieving the appellant of a contractual obligation which caused it to purchase unratably, since, among other reasons, no such accommodation on remand could avoid or postpone the federal question presented by this appeal. Pp. 96–98.

188 Kan. 351, 355, 362 P. 2d 599, 609, reversed.

*Mark H. Adams* argued the cause for appellant. With him on the briefs were *Lawrence I. Shaw, F. Vinson Roach, Mark H. Adams II* and *Joe Rolston.*

*Charles C. McCarter* argued the cause for appellee. With him on the brief was *Hugh B. Cox.*

*Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Ralph S. Spritzer, Richard A. Solomon, Howard E. Wahrenbrock* and *Arthur H. Fribourg* filed a brief for the Federal Power Commission, as *amicus curiae.*

Briefs of *amici curiae,* urging affirmance, were filed for the State of Texas by *Will Wilson,* Attorney General, and *Linward Shivers,* Assistant Attorney General; for the State of Alabama by *MacDonald Gallion,* Attorney General; for the State of Colorado by *Duke W. Dunbar,* Attorney General; for the State of Georgia by *Eugene Cook,* Attorney General; for the State of Illinois by *William G. Clark,* Attorney General; for the State of Louisiana by *Jack P. F. Gremillion,* Attorney General; for the State of Mississippi by *Joe T. Patterson,* Attorney General; for the State of Montana by *Forrest H. Anderson,* Attorney General; for the State of Nebraska by *Clarence A. H. Meyer,* Attorney General; for the State of Nevada by *Charles E. Springer,* Attorney General; for the State of New Mexico by *Earl E. Hartley,* Attorney General; for the State of North Dakota by *Leslie R. Burgum,* Attorney General; for the State of Oklahoma by *Mac Q. Williamson,* Attorney General, and *Ferrell Rogers;* for the State of Utah by *A. Pratt Kesler,* Attorney General; for the State of Wyoming by *W. M. Haight,* Acting Attorney General; and for the Mid-Continent Oil & Gas Association by *W. W. Heard.*

Mr. Justice Brennan delivered the opinion of the Court.

The question in this case is whether orders of the Kansas State Corporation Commission which require the

appellant, an interstate pipeline company, to purchase gas ratably from all wells connecting with its pipeline system in each gas field within the State [1] invalidly encroach upon the exclusive regulatory jurisdiction of the Federal Power Commission conferred by the Natural Gas Act, 15 U. S. C. §§ 717–717w.

The appellant's pipeline system is connected to some 1,100 natural gas wells in the Kansas Hugoton Field [2] under about 125 purchase contracts between the appellant and various producers. The contracts have been duly filed with the Federal Power Commission. Under the

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[1] The general order of the Commission, which was embodied in Rule 82–2–219, provided:

RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY

"In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G. S. 1959, Supp. 55–703; Effective February 8, 1960)."

This order, directed generally at all purchasers within the Commission's jurisdiction, superseded an order of October 7, 1959, which specifically required appellant "to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field." When the general order was promulgated, the specific order was rescinded. The Kansas Supreme Court, however, considered the validity of both orders as though both were still in force. For purposes of our jurisdiction and consideration of the merits, it makes no difference whether the specific order survived, for the superseding general order was no less clearly directed at the appellant.

[2] For a history of the discovery and development of the Hugoton Field, and the Kansas Commission's earlier efforts to insure correlative rights in, and to regulate the taking of gas from, that field, see generally American Bar Association Section of Mineral Law, Conservation of Oil and Gas—A Legal History, 1948 (1949), 165–183.

oldest contract, known as the Republic "A" contract, which was made in 1945 with Republic Natural Gas Company, and is still in force as modified in 1953, appellant was obligated to purchase gas from Republic up to the maximum production allowables for Republic's Kansas wells connected to appellant's system.[3] Appellant's contracts with its other producers provide that appellant's purchase commitments thereunder are expressly subject to the agreement with Republic. Thus appellant was bound to purchase from its other producers only so much of its requirements as were not satisfied by the quantities which the Republic contract required to be taken from Republic wells.

Appellant's requirements until 1958 were such that its purchases from its various producers were nevertheless roughly ratable, that is, in like proportion to the legally fixed allowables for each of the 1,100 wells in the Hugoton Field. However, after 1958 appellant's requirements aggregated substantially less than the total allowables for the Hugoton wells.[4] Thus the balance of the total

[3] The original Republic "A" contract, as amended, fixed the minimum-take requirements in terms of a percentage of appellant's natural gas needs for a particular district which it served from the Hugoton Field. A decision of the Kansas Supreme Court in 1952 modified that term of the contract by holding that appellant's takes from particular Republic wells could not exceed the production allowables set by the Commission for those wells, regardless of whether the total allowables might be lower than the percentage stipulated by the contract. *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708.

[4] The substantial underages in appellant's purchases were attributed to two factors: First, the rate of increase in the allowables for the wells from which appellant was taking had exceeded the increases in appellant's requirements from the Hugoton Field; and second, appellant's projected expansion of its system had been delayed unexpectedly by failure to secure the requisite certificates of convenience and necessity from the Federal Power Commission. Neither factor is material to the questions presented by this appeal.

requirements, after the contractually required purchases from Republic of the maximum allowables for the Republic wells, resulted in appellant's purchases from appellant's other producers of proportions substantially below the allowables for those producers' wells. This imbalance brought about the orders of the State Commission of which appellant complains.

A Kansas statute [5] empowers the State Commission so to "regulate the taking of natural gas from any and all . . . common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply . . . and to prevent unreasonable discrimination . . . in favor of or against any producer in any such common source of supply." The Commission adopted in 1944, avowedly as a conservation measure, a basic proration order designed to effect ratable production and to protect correlative rights in the Hugoton Field.[6] In 1959, in order to require appellant to take gas from Republic wells in no higher proportion to the allowables than from the wells of the other producers, the Commission entered the order specifically directing appellant to

[5] The statute, as amended in 1959, is Kan. Gen. Stat., 1949 (Supp. 1959), § 55–703, captioned "Production regulations; rules and formulas." The terms of the statute speak of "taking" rather than "purchasing" of natural gas; the Commission has decreed that the two terms are synonymous. It was the view of the dissenting judge in the court below, however, that the "taking" comprehended by the statute, nowhere defined in the statute itself, referred only to *production* so that the Commission lacked authority under state law to regulate *purchasing* in the manner of the present orders. See 188 Kan. 355, 365, 362 P. 2d 599, 606.

[6] The operative clause of this order designated the order as the basic guide for "the production of natural gas" from the Hugoton Field. No provisions of the order imposed enforceable obligations or sanctions upon purchasers, although one section admonished, ". . . purchasers . . . from any well, shall endeavor to limit their takes of gas to the quantities fixed in the schedule as the allowable production for such well . . . ."

purchase gas ratably from all 1,100 Hugoton wells. That order was superseded in February 1960 by the general order, directed at all natural gas purchasers taking Kansas gas. These orders presented the appellant with the alternatives of complying with the obligations of the Republic contract and increasing its takes from the other producers' wells—thus taking more gas from Kansas than it could currently use—or of risking liability for a breach of the Republic contract by decreasing its takes from the Republic wells below the allowables.[7]

Appellant challenged the two orders in the Kansas courts on the ground, among others, that they unconstitutionally invaded the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act. The Kansas Supreme Court sustained the orders, 188 Kan. 351, 355, 362 P. 2d 599, 609; on rehearing, 188 Kan. 624, 364 P. 2d 668. We noted probable jurisdiction of an appeal to this Court, 370 U. S. 901. We disagree with the Kansas Supreme Court, for we hold that the State Commission's orders did invade the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale.

## I.

We consider first the ground relied upon by the Kansas Supreme Court, that the orders constitute only state regulation of the "production or gathering" of natural gas, which is exempted from the federal regulatory domain by the terms of § 1 (b) of the Natural Gas Act, 15 U. S. C. § 717 (b). These orders do not regulate "production or gathering" within that exemption. In a line of decisions beginning with *Colorado Interstate Gas Co.* v.

[7] Pending in a Kansas trial court are two suits by Republic against appellant to recover damages for appellant's failure to purchase gas in the quantities required by the contracts.

*Federal Power Comm'n*, 324 U. S. 581, 598, and *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U. S. 682, 689–693, it has been consistently held that "production" and "gathering" are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 680–681; *Continental Oil Co.* v. *Federal Power Comm'n*, 266 F. 2d 208; *Huber Corp.* v. *Federal Power Comm'n*, 236 F. 2d 550. Appellant is not a producer but a purchaser of gas from producers, and none of its activities in Kansas shown upon this record involves "production and gathering, in the sense that those terms are used in § 1 (b) . . . ."[8] *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, at 678.

II.

The Kansas Supreme Court also sustained the orders on the ground that neither order threatened any actual invasion of the regulatory domain of the Federal Power Commission since it "in no way involves the price of gas." 188 Kan., at 624, 364 P. 2d, at 668. It is true that it was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the States—whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power. See *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. But our inquiry is not at an end because the orders do not

[8] Thus we have no need to consider the effect of the "production or gathering" exemption upon ratable-take orders directed exclusively at independent producers of natural gas. For contrasting views on that question, compare Kelly, Gas Proration and Ratable Taking in Texas, 19 Tex. Bar J. 763, 797 (1956), with Comment, Ratable Taking of Natural Gas, 11 S. W. L. J. 358, 360–361 (1957).

deal in terms with prices or volumes of purchases, cf. *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 478. The Natural Gas Act precludes not merely *direct* regulation by the States of such contractual matters. See *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U. S. 498, 506–509. The Congress enacted a comprehensive scheme of federal regulation of "all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company." [9] *Phillips Petroleum Co.* v. *Wisconsin, supra,* at 682; see H. R. Rep. No. 709, 75th Cong., 1st Sess. 2.

The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, *Natural Gas Pipeline Co.* v. *Panoma Corp.,* 349 U. S. 44, or for state regulations which would indirectly achieve the same result.[10] These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regu-

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[9] Persistent efforts to narrow the scope of the broader exclusive federal jurisdiction conferred by the statute have been unavailing. See, *inter alia,* H. R. 4051, 80th Cong., 1st Sess.; H. R. 4099, 80th Cong., 1st Sess.; H. R. 1758, 81st Cong., 1st Sess.; and S. 1498, 81st Cong., 1st Sess. "Attempts to weaken this protection [of consumers against exploitation at the hands of natural-gas companies] by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language." *Phillips Petroleum Co.* v. *Wisconsin, supra,* at 685.

[10] Our decisions in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma,* 340 U. S. 190, are not contrary. "In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act." *Natural Gas Pipeline Co.* v. *Panoma Corp., supra,* at 45.

lation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain.

The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340—a task which would otherwise presumably be the State Commission's. Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. See *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. The prospect of interference with the federal regulatory power in this area is made even more acute by the fact that criminal sanctions imposed by state statute for noncompliance fall upon such purchasers and not upon the local producers. Therefore, although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress.

It may be true, as the State Commission urges, that accommodation on the part of the Federal Power Commission could avoid direct collision—but this argument

misses the point. Not the federal but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field. Cf. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236. We have already said that the question to be asked under this statute is "whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1, 19–20.

III.

Appellee's principal contention, sustained by the Kansas Supreme Court, is that ratable taking is essential for the conservation of natural gas, and that conservation is traditionally a function of state power. There is no doubt that the States do possess power to allocate and conserve scarce natural resources upon and beneath their lands. We have recognized such power with particular respect to natural gas. *Patterson* v. *Stanolind Oil & Gas Co.,* 305 U. S. 376; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300. But the problem of this case is not as to the existence or even the scope of a State's power to conserve its natural resources; the problem is only whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power if those means threaten effectuation of the federal regulatory scheme.

We have already held that a purpose, however legitimate, to conserve natural resources, does not warrant *direct* interference by the States with the prices of natural gas wholesales in interstate commerce, *Cities Service Gas Co.* v. *State Corporation Comm'n,* 355 U. S. 391; *Michigan Wisconsin Pipe Line Co.* v. *Corporation Comm'n,* 355 U. S. 425. It has been suggested that those decisions are at variance with *Champlin Refining*

*Co.* v. *Corporation Comm'n,* 286 U. S. 210, in which we sustained a state proration order designed to further conservation, against a challenge under the Commerce Clause.[11] We reject that suggestion. The Court in *Champlin* carefully limited that holding to regulations which, the Court observed precisely, "apply only to *production* and *not to sales or transportation* of crude oil or its products." (Italics supplied.) The Court further noted, "[s]uch *production* is essentially a mining operation and therefore is not a part of interstate commerce . . . ." 286 U. S., at 235. (Italics supplied.) And, after enactment of the Natural Gas Act, in confirming state power to achieve conservation objectives, the Court took care to say, "[t]hese ends have been held to justify control over *production* even though the uses to which property may profitably be put are restricted." *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra,* at 185–186. (Italics supplied.) Thus our cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at producers and production. The former cannot be sustained when they threaten, as here, the achievement of the comprehensive scheme of federal regulation.

Of course, the Kansas method before us would fail, for the reasons given, even if it were Kansas' only means of attaining these ends. The State does not, however, appear to be without alternative means of checking waste and disproportionate or discriminatory taking.[12] More-

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[11] See American Bar Association Section of Mineral and Natural Resources Law, Conservation of Oil and Gas—A Legal History, 1958 (1960), 342.

[12] See, *e. g., Colorado Interstate Gas Co.* v. *Federal Power Comm'n, supra,* at 602–603; cf. *Patterson* v. *Stanolind Oil & Gas Co., supra.* The availability of regulatory alternatives, particularly

over, the invalidation of this particular form of state regulation does not result in a regulatory "gap" of the sort which the Act was designed to prevent. *Phillips Petroleum Co.* v. *Wisconsin, supra,* at 682–683. For example, we have very recently recognized that the Commission can and should take appropriate account of cer-

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in the form of proration and similar orders directed at producers, has been much discussed. See the view of a member of the Kansas Corporation Commission, Byrd, Contractual and Property Rights as Affected by Conservation Laws and Regulations, Tenth Annual Institute on Oil and Gas Law and Taxation, 1, 6–7 (1959); see also American Bar Association Section of Mineral Law, Conservation of Oil and Gas—A Legal History, 1948 (1949), 170–171; Kulp, Oil and Gas Rights (1954), § 10.100; 1 Kuntz, Treatise on the Law of Oil and Gas (1962), § 4.7.

It has been urged that as a practical matter restrictions upon purchasers more effectively and easily achieve ratable taking, see 1A Summers, Oil and Gas (1954), 139 and n. 9.30. On the contrary, it has also been argued that the very objectives sought to be achieved here may be achieved through ratable production orders, Comment, Ratable Taking of Natural Gas, 11 S. W. L. J. 358, 359, 362 (1957). We note too the suggestion of a witness in the proceeding below that the result sought by the orders herein might have been achieved by requiring Republic to decrease production from its wells rather than by requiring appellant to increase its purchases from those wells. R. 33. This apparently was also the view of the dissenting judge below, 188 Kan., at 365, 362 P. 2d, at 606. See, as to the obligation of the States to pursue alternatives which avoid interference with federally protected interstate commerce, *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 354–356.

There is no occasion to consider appellant's further argument that the Kansas Commission's orders were tainted by an improper motive, that is, to require overproduction of Kansas Hugoton wells in order to prevent disadvantageous drainage to Texas and Oklahoma, which share the Hugoton Field with Kansas. The relevancy of motive to the validity of such regulations has been questioned, *Stephenson* v. *Binford,* 287 U. S. 251, 276. See, however, *Thompson* v. *Consolidated Gas Utilities Corp.,* 300 U. S. 55, 69–70, where the Court invalidated a state proration order "shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights . . . ."

tain conservation factors in certification proceedings. *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp., supra,* at 20–22. See also McGrath, Federal Regulation of Producers in Relation to Conservation of Natural Gas, 44 Geo. L. J. 676 (1956).

IV.

Although what we have said answers the question for decision, it is appropriate that we comment upon a suggestion advanced both by appellant and by the Federal Power Commission as *amicus curiae.* That suggestion was that if we should hold, as we do hold, that the orders invalidly invade the federal regulatory jurisdiction, the judgment should not be reversed but the case should rather be remanded to the Kansas Supreme Court. The theory is that the Kansas Supreme Court might, in light of our holding, now hold that the orders effected a modification of the Republic "A" contract such as to permit performance of the contract through takings from the Republic wells in such lower amounts as may be necessary to achieve ratability with the takings from the wells of appellant's other producers. In short, the suggestion is that the state court, if afforded the opportunity, might now so harmonize the Republic contract with the Commission's order that there would result no measurable effect upon interstate transmissions or sales.

We reject this suggestion for several reasons. First, both opinions of the Kansas Supreme Court show that the court clearly recognized the substantiality of the federal question in the asserted encroachment of the orders upon the federal regulatory scheme. The court squarely decided the federal question in favor of the validity of the orders. Neither opinion rests this holding on an independent nonfederal ground of decision, and the appellant and the Commission, by suggesting a remand, in effect concede as much. Nor is there any undecided

aspect of the case upon which the Kansas Supreme Court might still sustain the orders upon a nonfederal ground. Cf. *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95. We and the Kansas Supreme Court are therefore in complete agreement that the federal question as to the validity of the orders cannot be avoided. It would hardly be seemly for us to ask the Kansas Supreme Court to reconsider its holding because we have reached a different conclusion on that question.

Furthermore we have difficulty perceiving how we could properly invite the Kansas Supreme Court to interpret the Republic "A" contract in light of the orders with a view to possible abatement of the federal question. That contract was not in any respect made an issue in this lawsuit—indeed, Republic is not a party; the controversy is solely between the appellant and the State and concerns only the validity of the orders. To invite consideration by the Kansas Supreme Court of the possible accommodation of the contract with the orders so as to avoid the asserted invalid trespass on the federal regulatory area, is necessarily to ask the Kansas court to do one of two things: (1) to determine whether the orders can be accommodated with a contract which is in no sense before the court and in the absence of one of the contracting parties; or (2) to vacate its holding that the orders are not invalid for encroachment on the federal domain, and abstain from deciding that question pending the decision of some action which may squarely pit the contract against the orders. In the circumstances, to follow the suggestion to remand would on our part be highly irregular.

In any event the suggestion misconceives the true nature of the question which the Kansas Supreme Court and this Court were called upon to decide. The federal question does not arise from an asserted actual and immediate conflict between the federal and state regulations.

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The question is whether the state orders may stand in the face of the pervasive scope of federal occupation of the field. Cf. *San Diego Building Trades Council* v. *Garmon, supra,* at 241–244. Indeed, even if the issue of the accommodation of the Republic "A" contract with the orders had been actually framed in the lawsuit, the mere fact that the Kansas court might make the suggested accommodation would not necessarily permit the Kansas court or this Court to avoid decisions of the federal question, since even then it would have to be determined whether the orders invalidly jeopardize the Natural Gas Act's objective of uniformity. See *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp., supra,* at 28. For, if the federal question could be avoided or postponed just short of actual collision, by *ad hoc* accommodation on the part of every State, then the scope of federal regulatory power would vary in accordance with the kaleidoscopic variations of local contract law.

The judgments are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG join, dissenting.

The conflict asserted between the Kansas Commission's "ratable take" orders and the authority of the Federal Power Commission is that by virtue of the combined effect of such orders and the minimum "take or pay" provisions of Northern's Republic "A" contract the consumer price of Northern's gas sold in interstate commerce will be forced up, thereby potentially embarrassing the Federal Power Commission's effective exercise of its authority over

such prices.[1] The premise of this alleged conflict is of course that Northern's Republic "A" contractual obligations remain unaffected by the Kansas Commission's ratable take orders.

The appellee Commission says that even if all this be correct its orders are nonetheless valid. The Federal Power Commission as *amicus,* while denying this conclusion, says, however, that no significant conflict with federal authority would arise if the effect of the State Commission's orders is to abrogate take or pay provisions such as those contained in the Republic "A" contract, and suggests that the case be remanded to the Kansas Supreme Court for determination of that question of state law. This would obviate the necessity of our deciding at this time any questions of federal law.

Without intimating any view upon the federal questions,[2] it seems to me that the Federal Power Commis-

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[1] These effects, as claimed by the appellant and the Federal Power Commission, are summarized in the appellee's principal brief on this appeal (p. 26) as follows: "To comply with the Kansas orders by taking ratably in the Kansas Hugoton Field, appellant, it is argued, would have to do one of two things: (1) increase its takes from its other connections in the field until they become ratable with its takes from the Republic A wells, or (2) continue to take the same amount from the field as a whole but reallocate its takes so as to make them ratable by decreasing takes from Republic to a figure below the amount provided by the contract and increasing takes from other wells. It is contended that the first of these courses would require appellant either to take from the Kansas Hugoton Field gas which it does not want and for which it has no present market or to reduce its takes in other fields and thereby incur contractual liability to producers in those fields, and that the second would result in contractual liability to Republic. Either course, it is argued, will necessarily cause an increase in the price of gas to the ultimate consumer, and for this reason the Kansas orders are inconsistent with the Natural Gas Act."

[2] At the 1958 Term the Court dismissed for want of a substantial federal question an appeal presenting substantially the same broad

sion's suggestion is an obviously sensible one. Cf. *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708. The Court's opinion, as I understand it, gives three principal reasons for refusing to remand: (1) the State Commission's orders are in any event invalid *per se* because they bear upon *purchasers* and not *producers* of natural gas; (2) even if Northern were no longer bound by the quantity obligations of its Republic "A" contract, the Kansas orders would still be invalid because they require Kansas purchasers who previously took gas unratably to readjust their purchasing patterns, which might possibly affect ultimate consumer prices; and (3) the Kansas Supreme Court in fact reached and decided the federal questions and, apart from that, there are other reasons that would make remand a "highly irregular" course. I can see little or nothing in any of these objections to remand.

## I.

That the Kansas orders are directed at purchasers should not be allowed to obscure their true nature. The production of natural gas and its movement into interstate channels constitute one and the same physical operation. Thus the Kansas orders limiting the volume of gas a pipeline may purchase from a given well are tantamount to a limitation on the production of that well. Indeed an order directed to the purchaser of the gas rather than to the producer would seem to be the most feasible method of providing for ratable taking, because it is the purchaser alone who has a first-hand knowledge as to whether his takes from each of his connections in the field are such

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federal question which the Court decides today. See *Permian Basin Pipeline Co.* v. *Railroad Comm'n*, 358 U. S. 37 (reported below at 302 S. W. 2d 238; and see the Jurisdictional Statement in this Court, No. 64, Oct. Term, 1958).

that production of the wells is ratable.[3] An order addressed simply to producers requiring each one to produce ratably with others with whose activities it is unfamiliar and over whose activities it has no control would create obvious administrative problems.[4]

There is thus no warrant for concluding that just because the Kansas orders read "purchaser" rather than "producer" they are an attempt to regulate the interstate sale of natural gas. Their purpose and effect are to limit production—the physical act of drawing gas from the earth. To the extent, then, that appellant's operations control the volume of gas produced, they involve "production and gathering, in the sense that those terms are used in [the] § 1 (b)" exemption of the Natural Gas Act. *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, 678.

But regardless of whether the § 1 (b) exemption is applicable here, the orders do not necessarily invade areas reserved to exclusive federal authority.[5] The mere fact

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[3] Most of the more important oil and gas producing States have long had statutes providing for ratable taking by *purchasers* to protect correlative rights. See Tex. Stat. Ann., Tit. 102, Art. 6049a, §§ 8, 8a (enacted in 1931); Okla. Stat. Ann., Tit. 52, § 240 (enacted in 1915); La. Rev. Stat., 1950, Tit. 30, §§ 41–46 (enacted in 1918).

[4] In these circumstances the situation here is hardly comparable to one in which a State has attempted to impose upon a foreign corporation, not doing business in the State, liability for the collection of a use tax with respect to goods purchased by residents of the taxing State at a store of the corporation located in the State of its domicile. See *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340. Surely the Natural Gas Act was not intended to relieve interstate pipelines doing business in a particular State from the mere mathematical computation involved in ratably distributing its over-all need for natural gas among the producers with which it has business connections in that State.

[5] As this Court noted in *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1, 8: ". . . Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers

that they are directed at purchasers does not, of itself, interfere with the Federal Power Commission's functions of certification (§ 7 of the Act) or rate regulation (§§ 4 and 5 of the Act).[6] And I find it hard to reconcile the Court's holding on this score with its statement that "conservation measures aimed directly at interstate purchasers . . . cannot be sustained *when they threaten, as here,* the achievement of the comprehensive scheme of federal regulation." *Ante,* p. 94. (Emphasis added.) As will be shown (*infra,* pp. 103–106), this threat, if it exists at all in this case, is no different from that flowing from other valid conservation measures.

The Federal Power Commission itself acknowledges that if the Kansas orders release appellant and others from contractual obligations of the sort in question here, then such orders would entail no significant conflict with federal authority. The Commission states: "In that event, despite the fact that the Kansas regulation is in terms addressed to interstate pipeline companies rather than to Kansas producers, we would not urge that it so impinged upon matters of national, as opposed to local, concern, or that it so interfered with the regulatory functions and purposes of the Federal Power Commission under the Natural Gas Act, as to require its invalidation under the supremacy clause." [7] For the further reasons that will now be discussed, I think this is a perfectly sound position.

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over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation."

[6] That criminal penalties for noncompliance are imposed on purchasers adds nothing to the fact that the orders are addressed to purchasers.

[7] Memorandum for the Federal Power Commission as *amicus curiae,* pp. 21–22.

## II.

Of course a remand is unnecessary if, as in the Court's view, the Kansas Commission's orders are invalid even though appellant is deemed to be no longer bound by the take or pay provisions of the Republic contract. But the remote possibility of an adverse effect on the cost structures of Kansas purchasers falls far short of establishing such invalidity.

The ratable take orders here were intended as conservation measures [8]—to protect the correlative rights of producers taking gas from a common source of supply by preventing drainage from underproduced wells to overproduced wells.[9] It has always been recognized that the States possess the power to conserve scarce resources such as natural gas and to prevent unfair and discriminatory production of this resource by some wells at the expense of others. See, *e. g., Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190. It is difficult to imagine any exercise of this conservation power that would not carry with it the possibility of affecting the costs incurred by those who purchase gas from producers. Regulations requiring the casing of wells, prohibiting the use of pumps, restricting production to a certain percent of a well's "open flow," imposing a particular gas-oil ratio, controlling drilling operations

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[8] The Court disclaims any need to consider the contention that the true purpose of the Kansas orders was to require overproduction of the Kansas part of the Hugoton Field in order to prevent its drainage into Texas and Oklahoma (*ante*, pp. 94–95, note 12).

[9] When one well in a common pool produces a large volume of gas, the pressure is reduced at that point; the gas in the common pool then tends to flow toward the low pressure point, thereby reducing the amount of gas available for production by other wells.

and pipeline pressure, prescribing the permissible spacing of wells, and enforcing pooling or unitization may reduce the amount of gas available for sale by a particular producer (at least in the short run) and thus force a purchaser to buy from it or someone else probably at greater cost. Yet it has never been suggested that such state measures are for that reason invalid.

Indeed, the most direct interference with the availability of gas for interstate sale is the "allowable" order. It places a ceiling on the amount of gas that may be produced by a particular well during a given period of time and inevitably makes pipelines spread their demand among many wells. Obviously its possible effect on cost is precisely the same as that which may be caused by a ratable take order, for the two orders are merely variations of the same regulatory measure; both are designed to prevent the disproportionate taking of gas from some wells to the disadvantage of others.

In *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U. S. 210 (1932), this Court sustained, against a challenge under the Commerce Clause, a state allowable order. Since the States had the power to issue such an order at the time the Natural Gas Act was passed, nothing in that Act can now be considered to withdraw it. This is so because it is beyond dispute that when Congress enacted the Natural Gas Act in 1938 it did not intend to deprive the States of any regulatory powers they were then deemed to possess under the Constitution. Rather, the Act was intended only to fill the "gap . . . thought to exist at the time the Natural Gas Act was passed" by providing for federal regulation of those aspects of the natural gas business that the States were at that time believed to be constitutionally incapable of regulating. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 684, 685–687. As was specifically stated in the House Com-

mittee Report, the Act "takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority." H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 2.[10]

If an allowable order is now valid, what is the distinction between such an order and the ratable take orders in the present case? The Court points to no difference in terms of effect on cost structure, but only to the fact that the orders here are directed at purchasers and not producers. For reasons already discussed, *supra,* pp. 100–102, this difference is illusory.

Quite apart from the absence of any significant difference between the possible general cost ramifications of an allowable and a ratable take order, the very facts of the case before us demonstrate the folly of determining whether or not the jurisdiction of the Federal Power Commission has been invaded on the basis of general possibilities unsupported by specific data. Appellant is paying a higher price for gas to Republic than to any other producer in the Kansas Hugoton Field. If appellant could reduce its take from Republic wells without contractual liability, the over-all cost of its gas purchases would in all likelihood decrease. Surely such a beneficial effect on appellant's cost structure is not inconsistent with the purposes of the Natural Gas Act. And we have no way of knowing the extent to which the same is true of other Kansas purchasers. The lurking danger of collision with federal regulation that the Court fears may be completely nonexistent. Yet on this insecure founda-

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[10] See also *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507, 517 ("The Act, though extending federal regulation, had no purpose or effect to cut down state power"); *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 502–503, 512–513; *Interstate Natural Gas Co.* v. *Federal Power Comm'n,* 331 U. S. 682, 690.

tion the Court builds a rule that, if consistently applied, may well destroy the conservation powers of the States. And this in the name of an Act expressly intended to preserve existing state powers.

III.

The Court's remaining arguments against remand are equally unsatisfactory.

It is said that the Kansas Supreme Court did not rest its decision on a state ground (the abrogation, by virtue of the Commission's orders, of Northern's take or pay obligations under the Republic contract), but decided the federal questions. Whatever may have prompted the state court to this course—perhaps a desire to obtain from this Court a broad decision on the federal question or a mistaken belief as to the irrelevancy of the contract question to the existence of the state power now questioned—this surely does not constrict the grounds of our adjudication of the case. It is familiar practice for this Court to refuse to reach federal constitutional questions on which the state courts have predicated decision. It is enough to refer to the landmark concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346–348, enumerating principles designed to avoid the unnecessary adjudication of constitutional questions—a tenet of adjudication to which this Court has always strictly adhered.

A remand, it is also said, would be a "highly irregular" step for the further reasons that the effect of the State Commission's orders on the Republic "A" contract was not drawn in question in this suit and the Republic Company itself was not a party to the litigation. However, in light of what has already been said the germaneness of that contract issue to the question of the validity of state power in the premises is apparent. And apart from the presumed availability of state procedures for the

vouching into the case of the Republic Company, we are informed by the Federal Power Commission that there is now pending in the state courts another case against Northern, to which Republic *is* a party, that involves the continuing validity of the take or pay provisions of the "A" contract.[11] Hence, if necessary, the Kansas Supreme Court could on remand of the present case hold its hand pending resolution of the contract issue in the other litigation.

In short, I cannot understand why this Court should not remand for determination of a state law issue that may dispose of this case, as the Court has done in other comparable instances. See, *e. g., Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220, 228–230; *Aquilino* v. *United States,* 363 U. S. 509, 515–516.

I would vacate the judgments of the Supreme Court of Kansas and remand the case to that court for a determination, in accordance with Kansas procedures, as to the effect of the State Commission's orders on the Northern-Republic "A" contract.

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[11] *Republic Natural Gas Co.* v. *Northern Natural Gas Co.,* Nos. 4165 and 4235, District Court of Stevens County, Kansas, in which, we are told, Republic claims damages from Northern for failure to observe the take or pay provisions of the "A" contract.

# GALLICK *v.* BALTIMORE & OHIO RAILROAD CO.

CERTIORARI TO THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY.

No. 76. Argued December 10, 1962.—
Decided February 18, 1963.

While working on a railroad near a stagnant, vermin-infested pool of water, petitioner suffered an insect bite which became infected and ultimately resulted in the loss of both of his legs. He sued the railroad in a state court under the Federal Employers' Liability Act, alleging that the railroad was negligent in maintaining a stagnant pool that attracted vermin and insects. Upon a special verdict of the jury, the trial court entered judgment awarding damages to petitioner. The state appellate court reversed on the ground that proof of a causal connection between the negligence and damage fell short of that required for the consideration of a jury. *Held:* The state appellate court improperly invaded the function and province of the jury, and its judgment is reversed. Pp. 109–122.

(a) The record contains sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of the railroad, and the state appellate court erred in refusing to accept the jury's verdict. Pp. 113–117.

(b) Reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence; but this requirement was satisfied in the present case by the jury's findings of negligence in maintaining the filthy pool of water. Pp. 117–119.

(c) There was no fatal inconsistency in the jury's findings. Pp. 119–122.

173 N. E. 2d 382, reversed.

*Marshall I. Nurenberg* argued the cause for petitioner. With him on the briefs were *A. H. Dudnik* and *Meyer A. Cook.*

*Alexander H. Hadden* argued the cause for respondent. With him on the briefs were *Raymond T. Jackson* and *Russell E. Leasure.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Upon a special verdict of the jury, the Common Pleas Court of Cuyahoga County, Ohio, entered judgment awarding damages to petitioner in this Federal Employers' Liability Act[1] suit. The Court of Appeals reversed, 173 N. E. 2d 382, and the Ohio Supreme Court refused further appellate review, 172 Ohio St. 488, 178 N. E. 2d 597, making the decision of the intermediate appellate court the final judgment rendered by the state courts. This Court granted certiorari, 369 U. S. 848, to consider the question whether the decision below improperly invaded the jury's function. We have concluded that the decision below is erroneous and must be reversed.

Petitioner was a spotting crew foreman working on or about August 10, 1954, along the respondent railroad's right of way in the Cuyahoga River "flats" section of Cleveland, Ohio. At the particular stretch of roadbed where petitioner was working on that afternoon, there had been for many years a pool of stagnant water, in and about which were dead and decayed rats and pigeons, or portions thereof. Insects had been seen on, over, and about this stagnant pool, and the evidence showed, as the Court of Appeals stated, that respondent had long been aware of the fetid condition of this pool. 173 N. E. 2d, at 383. While he was temporarily working near the pool, petitioner experienced a bite on his left leg just above the knee. He grasped the spot with his hand and felt an object under his trousers which seemed to be a large insect and which, when he crushed it, dropped out of his trouser leg. The wound subsequently became infected. The infection failed to respond to medical treatment, and worsened progressively until it spread throughout petitioner's body, creating pus-forming lesions and eventually necessitating the amputation of both his legs. None of the

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51.

doctors who treated and studied petitioner's case could explain the etiology of his present condition, although some of them diagnosed or characterized it as "pyodermagangrenosa, secondary to insect bite." See *id.*, at 384.

The Federal Employers' Liability Act makes railroads liable in damages to any employee suffering "injury or death resulting in whole or in part from the negligence of . . . [the] carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . roadbed . . . or other equipment." 45 U. S. C. § 51. In his complaint petitioner alleged respondent's negligence both in permitting the stagnant pool to accumulate dead vermin and attract insects, and in its furnishing a defective and unsafe place for petitioner's work. The respondent denied any negligence and contended that if petitioner's serious injuries resulted from an insect bite sustained while working on railroad property, such consequences "were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose" to exercise due care to protect petitioner "from any such risk." 173 N. E. 2d, at 384.

After a lengthy trial, the court, pursuant to the State's special verdict statute, Ohio Rev. Code, § 2315.15, under which no general verdict is rendered by the jury, submitted some two dozen interrogatories to the jury and charged them as to what it deemed the applicable law of negligence. The special verdict of the jury, to the extent that it is relevant here, follows (answers italicized):

> "10. On approximately August 10, 1954, was plaintiff bitten by an insect? *Yes.*
>
> . . . . . .
>
> "13. Did the defendant B & O provide the plaintiff Mr. Gallick a reasonably safe place to work under the facts and circumstances existing at the time? *Jury can't decide on this question.*
>
> "14. [D]id the defendant B & O know that by permitting the accumulation of said pool of stagnant

water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area? *Yes.*

"15. If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area? *Yes.*

"16. Was the defendant negligent in one or more of the particulars alleged in the petition? *Yes.*

"17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence. *There existed a pool of stagnant water on the premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats, and various forms of bugs and vermin.*

"18. Was the illness or diseases from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises? *Yes.*

"19. Were the injuries to the plaintiff proximately caused . . . by . . . the acts or omissions of the defendant? *Yes.*

"20. [W]as there any reason for the defendant B & O to anticipate that such [maintaining stagnant, infested pool] would or might probably result in a mishap or an injury? *No.*

"21. Is there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff? *Yes.*

"22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? *No.*"

The trial court entered judgment for petitioner and respondent appealed, assigning as error various trial rulings, none of which the Court of Appeals found "prejudicial to the rights of the appellant," except the fundamental one, in the court's view, that judgment for respondent should have been entered on a directed verdict because the trial evidence was insufficient to support a judgment for petitioner.[2] The court said that the evidence showed that an insect bit petitioner and caused his severe injuries. It also found that "to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather," on property where the railroad's employees were required to work "could furnish the gravamen of an offense [*sic*] under the Federal Employers' Liability Act." 173 N. E. 2d, at 387. The court emphasized, however, that there was no "direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool," or had become infected by the pool with the substance that caused petitioner's infection, evidence which would negative the alternative possibility that the insect had emanated from "the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad." The Court of Appeals therefore deemed the evidence merely "a series of guesses and speculations . . . a chain of causation too tenuous to support a conclusion of liability." *Id.*, at 388. "[W]e have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and the damage falls short of

[2] For the same reason the Court of Appeals found error in the trial court's refusal to enter a judgment n. o. v. See Journal Entry, R. 629.

that required for the consideration of a jury." *Ibid.* Accordingly, it reversed the judgment of the Court of Common Pleas and entered final judgment for respondent.

I.

We think that the Court of Appeals improperly invaded the function and province of the jury in this Federal Employers' Liability Act case. According to the Court of Appeals, the break in the causal chain that turned it into a mere "series of guesses and speculations" was the want of evidence from which the jury could properly conclude that respondent's fetid pool had had something to do with the insect that bit petitioner. The only question was whether or not the insect was from or had been attracted by the pool. We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent.

As the Court of Appeals stated, "insects were seen on, over and about this stagnant pool." According to petitioner's undisputed testimony, he stood near the pool for about a half a minute; then he started to walk away and was bitten on the leg after he took a few steps, perhaps one or two seconds later. Petitioner also testified, on cross-examination, that he had at times seen insects of about the same size as that which bit him crawling over the dead rats and pigeons in the stagnant pool. And on cross-examination by respondent two medical witnesses testified that stagnant, rat-infested pools breed and attract insects.[3] Moreover, the jury specifically found that the pool accumulated and attracted bugs and vermin.

[3] The Court of Appeals emphasized the fact that no similar bite was ever complained about, as a factor in gauging the probability that the actual causal chain corresponded to petitioner's theory of the case, 173 N. E. 2d, at 387; it accepted as supported by "sufficient credible evidence" the finding that an insect bit petitioner, but it disagreed

The Court of Appeals erred in demanding either "direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool" or else more substantial circumstantial evidence than that adduced here "that the pool created conditions and influences which helped to incubate or furnish an environment for the bug . . . or that the insect, having traveled from other areas, became contaminated or infected by the pool." 173 N. E. 2d, at 388. Under the ruling cases in this Court the evidence present was sufficient to raise an issue for the jury's determination as to whether the insect emanated from the pool.

In *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, one of the leading cases, the Court granted certiorari "because of important problems as to petitioner's right to a jury determination of the issue of causation." There was no direct evidence of how the decedent was killed. There was evidence that the respondent railroad had been negligent or careless in failing to ring a warning bell before moving an engine, and evidence that the victim was killed by being run over by a train. The question of how the victim met his death was susceptible to various answers, all somewhat conjectural because of the want of direct evidence, some of which supported petitioner's claims and others respondent's. The Court of Appeals set aside a jury verdict for petitioner for failure of the evidence to make out proximate cause, but this Court reversed:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that

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with the finding that pool and insect bite were related. Although the record does not show that any complaint was ever made to respondent about insect bites, petitioner testified that he had complained to the section foreman about the vermin-infested pool several times and another witness testified that he was bitten by an insect near it in or about September 1954.

> the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co., supra,* 68; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 321 U. S., at 35.

Later Federal Employers' Liability Act cases involving sufficiency of the evidence on causation where several explanations are plausible follow the teaching of the *Tennant* case. In *Schulz* v. *Pennsylvania R. Co.,* 350 U. S. 523, a tug fireman was drowned in undetermined circumstances arising from his "work on . . . dark, icy and undermanned boats"; the lower court said: "There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two." This Court held that there was sufficient evidence of causation to require submission of the case to the jury. *Lavender* v. *Kurn,* 327 U. S. 645, was another Federal Employers' Liability Act case in which it was uncertain which of various alternative explanations

for the cause of the injury was correct. Petitioner's theory was that a mail-hook protruding from a train had hit the victim, while respondent's theory was that an unknown murderer was responsible. Both theories were plausible; the jury found for petitioner, but the lower court reversed for insufficient evidence. This Court reversed on the ground that the lower appellate court had committed "an undue invasion of the jury's historic function."

These cases, as does the instant case, all involved the question of whether there was evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm. In the more recent case, *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, one of the questions was whether, given the antecedent negligence or carelessness of the employer in maintaining a roadside surface with loose, slippery gravel instead of a firm, flat footing, the causal impact of such neglectfulness was negatived by the subsequent or concurrent negligence of the employee in failing to pay attention to what he was supposed to be doing. Although the context is thus somewhat dissimilar to the present one, the language used in the opinion is most apposite:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part . . . in producing the injury . . . . It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes . . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury

> or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." 352 U. S., at 506–507.

The facts before the jury fall within this standard and the Court of Appeals therefore erred in refusing to accept the jury's verdict.

II.

Although we have concluded that the jury could properly find that there was a causal relationship between the railroad's negligence and petitioner's injuries, that does not end the case.[4] Respondent makes the further argument that the judgment under review may be sustained on the alternative ground, not accepted by the Court of Appeals, that the injury was not reasonably foreseeable, and that therefore there was no negligence.

We agree with respondent that reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence. *Inman* v. *Baltimore & O. R. Co.*, 361 U. S. 138, 140; see *Brady* v. *Southern R. Co.*, 320 U. S. 476, 483–484; *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 54, 67; *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901, 903, 905 (dissenting opinions); *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 503; cf. *Morales* v. *City of Galveston*, 370 U. S. 165, 171; *Dalehite* v. *United States*, 346 U. S. 15, 42.[5] But this requirement has been satisfied in the

[4] See *B. F. Goodrich Co.* v. *United States*, 321 U. S. 126, 127; *United States* v. *American R. Exp. Co.*, 265 U. S. 425, 435; *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208, 210.

[5] *Kernan* v. *American Dredging Co.*, 355 U. S. 426, was concerned with the breach of a statutory or regulatory duty and does not control or purport to define the content of nonstatutory or nonregulatory duties amounting to negligence for the purposes of the Federal Employers' Liability Act.

present case by the jury's findings (Nos. 10, 14–19, 21) of negligence in maintaining the filthy pool of water. The jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances; [6] and that defendant's duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition—"defendant's duties are measured by what is reasonably foreseeable under like circumstances"—by what "in the light of the facts then known, should or could reasonably have been anticipated." [7] Thus when the jury found these facts: petitioner was bitten by an insect; the insect bite caused illness or disease and led to petitioner's present physical condition; the stagnant pool attracted bugs and vermin and was responsible for the insect bite and the injuries to petitioner; and respondent knew that the accumulation of the pool of water would attract bugs and

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[6] "Negligence is sometimes said to be a failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand, and sometimes, in other words, it is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?"

[7] "The B & O in this case was not required to guard against that which a reasonably prudent person, under the circumstances, would not anticipate as likely to happen. If a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct such a condition. You must apply this rule to this case. . . . Defendant's duties are measured by what is reasonably foreseeable under like circumstances. . . . In measuring the B & O's conduct here, the point of view to be taken should be the view before the mishap occurred, to see what, in the light of the facts then known, should or could reasonably have been anticipated. And you must follow this rule in this case."

vermin to the area—it is clear that the jury concluded that respondent should have realized the increased likelihood of an insect's biting petitioner while he was working in the vicinity of the pool.

Respondent places reliance, however, upon two special interrogatories returned by the jury. In one, No. 22, the jury found that respondent could not foresee that the stagnant pool would set into being a chain of events that would culminate in petitioner's present physical condition—loss of two limbs, widespread ulcerations, and permanent disability. In the other, No. 20, the jury found that respondent did not have reason to anticipate that its maintenance of the pool "would or might probably result in a mishap or an injury." It is said that interrogatories Nos. 20 and 22 are findings of no foreseeability, and that there is therefore a fatal inconsistency among the jury's findings and that they cancel one another out, necessitating a judgment for the defendant, or at least a new trial. See *Freightways, Inc.*, v. *Stafford*, 217 F. 2d 831, 835 (C. A. 8th Cir.); Fed. Rules Civ. Proc. 49 (b). See also *Larrissey* v. *Norwalk Lines*, 155 Ohio St. 207, 214–215, 98 N. E. 2d 419, 423–424; *Klever* v. *Reid Bros.*, 151 Ohio St. 467, 476, 86 N. E. 2d 608, 612. But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 364. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360; *McVey* v. *Phillips Co.*, 288 F. 2d 53 (C. A. 5th Cir.); *Morris* v. *Pennsylvania R. Co.*, 187 F. 2d 837 (C. A. 2d Cir.) (collecting authorities), before we are free to disregard the jury's special verdict and remand the case for a new trial.

We do not believe that the conclusion of fatal inconsistency is compelled by these findings. In the first place, the jury might not have equated a foreseeable insect bite with a mishap or injury. The trial judge more than once in his instructions separated an "insect bite" from "injury," "infection," "illness" or "disease." The answer to Question 20 thus might mean simply that while an insect bite was foreseeable, there was no reason to anticipate a "mishap" or "injury" from such a bite. This answer therefore falls in the same category as the jury's response to Question 22, where the jury found that there was no reasonably foreseeable causal relationship between the insect bite and the present physical condition of the plaintiff. It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable. See, *e. g.*, *Boal* v. *Electric Battery Co.*, 98 F. 2d 815, 819 (C. A. 3d Cir.); *Koehler* v. *Waukesha Milk Co.*, 190 Wis. 52, 57–63, 208 N. W. 901, 903–905 (collecting authorities); Restatement, Torts, § 435; 2 Harper and James, Torts, 1139–1140; Prosser, Torts, 260 (2d ed.); Seavey, Mr. Justice Cardozo and the Law of Torts, 48 Yale L. J. 390, 402–403.[8] And we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing which his

[8] "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement, Torts, § 435. "In these and like cases of what well may be called direct consequences, the courts generally hold defendant liable for the full extent of the injury without regard to foreseeability." 2 Harper and James, Torts, p. 1140. "There is almost universal agreement upon . . . liability for unforeseeable consequences when they follow an impact upon the person of the plaintiff." Prosser, Torts, 260.

"negligence played any part, even the slightest" (*Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 506) such a tort-feasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act. Cf. *Kernan* v. *American Dredging Co.*, 355 U. S. 426; *Coray* v. *Southern Pac. Co.*, 335 U. S. 520; *Lillie* v. *Thompson*, 332 U. S. 459. The answers to these two interrogatories are therefore not controlling for Federal Employers' Liability Act purposes.

In the second place, in deciding whether respondent had reason to anticipate and foresee any harm to petitioner, the trial court instructed the jury to take into account "the past experience respecting the location and conditions in question" and the fact "that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before August of 1954."[9] The jury thus might have determined that, since there had been no similar incidents at this pool in the past, the respondent had no specific "reason" for anticipating a mishap or injury to petitioner—a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act. Thus there is a second and independent ground for the court to have put aside No. 20 as immaterial. Looking at No. 20 in the context of the charge and the total context of the special verdict, see *McVey* v. *Phillips Co.*, 288 F. 2d 53, 59 (C. A. 5th Cir.); *Halprin* v. *Mora*, 231 F. 2d 197, 201

[9] "In measuring the B & O's duty to anticipate—that is, in considering how much and how far the defendant ought to have gone in foreseeing and guarding against possible mishaps and dangers—the past experience respecting the location and conditions in question may properly be drawn upon. It is entirely proper in this case to take into account the fact . . . that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before August of 1954, as . . . indicating what the defendant here should reasonably have foreseen for the future."

(C. A. 3d Cir.), we cannot assign it sufficient weight to warrant overturning the judgment of the trial court entered pursuant to the jury's special verdict.

We have examined respondent's other contentions and found them without merit, including the contention that there was insufficient evidence to support the finding of negligence. The Court of Appeals erred in depriving petitioner of the judgment entered upon the special verdict of the jury. *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360. The judgment of the Ohio Court of Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

MR. JUSTICE HARLAN, dissenting.

Heartrending as the petitioner's accident has turned out to be, I think this case should not have been brought here. It involves no unsettled questions of federal law calling for decision by this Court, nor, in any acceptable sense, a departure by the state courts from legal principles already decided requiring this Court's intervention. The case thus does not qualify for review under Rule 19.* See the dissenting opinion of Mr. Justice Frankfurter in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, and the separate opinion of this writer, p. 559. The case has

*In pertinent part, Rule 19 provides:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. . . ."

necessarily required an inordinate amount of time, which the Court can ill afford in the present state of its docket.

Reaching the merits, however, *id.*, pp. 559–562, I would affirm the judgment below. I agree with my Brothers STEWART and GOLDBERG as to the inconsistency of the jury's verdict. But in addition, I cannot say that the view of the record taken by the state courts, in holding that the evidence on the issue of causation was insufficient to make a case for the jury, was an arbitrary or unreasonable one. The opinion of the Ohio Court of Appeals evinces a conscientious effort to follow this Court's decisions under the Federal Employers' Liability Act, and more particularly the broad pronouncements made in the *Rogers* case, *supra*. On this score the Court's reversal seems to me no more than an exercise in second-guessing the state court's estimate of the record.

From another standpoint this case does have significance. It affords a particularly dramatic example of the inadequacy of ordinary negligence law to meet the social obligations of modern industrial society. The cure for that, however, lies with the legislature and not with the courts.

MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG, dissenting.

We cannot agree with the Court's disposition of this case, in view of the jury's explicit finding that injury to the petitioner was not reasonably foreseeable. As the Court correctly states, "foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." Interrogatory No. 20 was unambiguous: "[W]as there any reason for the defendant B & O to anticipate that such [maintenance of a stagnant, infested pool] would or might probably result in a mishap or an injury?" In our view the jury's answer to this interrogatory, find-

ing that the railroad had no reason here to anticipate mishap or injury, was irreconcilably inconsistent with its finding of negligence in answer to Interrogatory No. 16, and a new trial should have been ordered.

The Court agrees that the answer to Interrogatory No. 20 was inconsistent with the jury's answer to Interrogatory No. 16. But instead of concluding that this inconsistency cancels out the several findings involved and thus voids the entire verdict, the Court undertakes to search for an alternative meaning to be given to Interrogatory No. 20 in order to bring it into line with the special finding which favors the petitioner. The Court seeks support for this Procrustean exercise in the often-repeated admonition that courts should make every effort "to reconcile the jury's findings, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial." We think this generally sound guideline is misapplied in the present case.

The duty of courts to attempt to reconcile inconsistent jury findings has emerged from cases in which the jury answered special interrogatories *and also* returned a general verdict. See, *e. g., Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360.[1]

The inconsistencies which the courts have dealt with in these cases were inconsistencies between a general verdict for one of the parties and seemingly conflicting special findings in answer to added interrogatories. The purpose of such an effort has been to preserve, if possible,

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[1] *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355, is not to the contrary. In that case it was held that the Court of Appeals had erroneously synthesized a conflict between answers to special interrogatories, when no conflict appeared on the face of the several answers, and none was compelled by the theories underlying the several questions.

the integrity of the jury's general verdict. As one leading commentator has explained, in the context of Federal Rule 49 (b),

> "The power to enter judgment on findings consistent with each other but inconsistent with the general verdict is a constitutional one and does not violate the Seventh Amendment since the jury's findings of fact are not being re-examined but, as a reasonable regulation of practice, their more specific findings of fact are allowed to control over their general conclusion embodied in the general verdict. Every reasonable intendment should, however, be indulged in favor of the general verdict in an effort to harmonize it with the answers to the interrogatories, and the latter should be held controlling only 'where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences.' Of course, if the answers are inconsistent with each other, and one or more with the general verdict, the court cannot enter judgment upon the basis of any of the findings, and as provided by the Rule, should not direct the entry of judgment at all, but should return the jury for further deliberation or should order a new trial." 5 Moore, Federal Practice, ¶ 49.04.

Although the Court several times mentions a "special verdict" of the jury, this refers to no more than the answers given to the interrogatories. The fact is that the jury returned no general verdict for either party. The jury simply answered a list of 23 specific questions, and their answers neither were, nor under any fair reading can be made, consistent. Nothing in the structure of the jury's several findings marks the answer to Interrogatory No. 20 as the one which is obviously out of line. It would be as plausible—and as incorrect—to say that the finding

in response to Interrogatory No. 16 must be read to conform to the answer to Interrogatory No. 20, and to enter judgment for the respondent.[2]

We agree with the Court, and hence disagree with our Brother HARLAN, about the sufficiency of the evidence on the issue of causation to make a case for the jury under the standards laid down by this Court, *e. g., Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500. We also agree with the Court that no inconsistency with a finding of negligence arises from the jury's answer to Interrogatory No. 22, wherein it found that the railroad had no reason to anticipate the extent of the petitioner's injuries. In our view the answer to Interrogatory No. 22 was simply immaterial, because the interrogatory asked, in effect, whether the *extent* of the petitioner's injuries was foreseeable—an issue irrelevant to the merits of the case, as the Court's opinion aptly points out.

Our disagreement with the Court arises, therefore, only from its treatment of the jury's answer to Interrogatory No. 20. Since, as the Court recognizes, foreseeability of harm (as distinguished from foreseeability of the extent of injury covered by Interrogatory No. 22) is the test of liability in FELA cases, the jury's answer to Interrogatory No. 20 is plainly and irreconcilably inconsistent with its answer to Interrogatory No. 16.[3] Because the jury in

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[2] Indeed, were it proper to indulge in a process of speculation to derive meaning for one answer from the content of others—as the majority does to support its conclusion that the answer to Interrogatory No. 16 is the overriding one—support for preferring the answer to Interrogatory No. 20 and entering judgment for respondent could be gained from the jury's response to Interrogatory No. 13, wherein it could not agree on whether petitioner had been furnished an unsafe place to work, thereby further contradicting the existence of negligence which was found in answer to Interrogatory No. 16.

[3] Reference to the court's oral instructions to the jury concerning Interrogatories Nos. 16 and 20 additionally negatives the Court's attempted reconciliation of the jury's answers to these questions. The

answer to No. 16 found that the railroad was negligent, and yet at the same time specifically found in answer to No. 20 that the mishap was unforeseeable, it is, in our view, impossible to enter a judgment for either party based on these findings. By undertaking to reconcile irretrievably conflicting findings of the jury, the Court, we think, has made the same error that it correctly attributes to the Ohio Court of Appeals—it has invaded the province of the jury under this federal statute. We would avoid such an intrusion by ordering that the cause be put to another jury.

For these reasons we would set aside the judgment and remand this case for a new trial.

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description of negligence in No. 16 was merely a statement cast in terms of a "failure to observe ordinary care," without any suggestion that the "failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand" had to be a failure in relation to this plaintiff. In contrast to the negligence in the abstract which the jury can be said to have found in answer to Interrogatory No. 16, the judge instructed with reference to Interrogatory No. 20 that "In answering this question you are instructed that it is a matter of law [that] the defendant B & O is only to be held to a reasonable degree of care, and not to the performance of practicable impossibilities, but that where the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, introducing [*sic*—in producing?] the injury, then the employer has a duty to anticipate that such injury would or might probably result." This instruction dealt with the defendant railroad's duties as an employer in relation to the petitioner in a manner which the instruction concerning Interrogatory No. 16 had not. Moreover, it was, if anything, unduly favorable to petitioner in its equation of foreseeability with causation in fact, and yet the jury answered Interrogatory No. 20 in the negative.

# SCHLUDE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 80. Argued December 10, 1962.—Decided February 18, 1963.

Petitioners, who operated dance studios, kept their books and made their income tax returns on a fiscal-year accrual basis. They obtained from students contracts for dancing lessons over periods of years, to be paid for partly in cash and partly in installments, sometimes represented by negotiable notes which were discounted at banks. For the years 1952, 1953 and 1954, they reported as gross income only that portion of the advance payments received in cash and the amounts of notes and contracts executed during the respective years which corresponded with the number of hours taught. The balance was reserved for accrual in future years when additional lessons were taught, waived or forfeited. *Held:* It was proper for the Commissioner, in the exercise of his discretion under § 41 of the Internal Revenue Code of 1939 and § 446 (b) of the Internal Revenue Code of 1954, to reject petitioners' accounting system as not clearly reflecting income and to include as income in a particular year advance payments by way of cash, negotiable notes and contract installments falling due but remaining unpaid during that year. *American Automobile Association* v. *United States*, 367 U. S. 687. Pp. 129–137.

296 F. 2d 721, affirmed in part, reversed in part and remanded.

*Carl F. Bauersfeld* argued the cause for petitioners. With him on the briefs was *Robert Ash.*

*Assistant Attorney General Oberdorfer* argued the cause for respondent. With him on the brief were *Solicitor General Cox* and *Harry Baum.*

*Dean Acheson, Fontaine C. Bradley, John T. Sapienza, Robert L. Randall* and *Alvin Friedman* filed briefs for the American Institute of Certified Public Accountants, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

This is still another chapter in the protracted problem of the time certain items are to be recognized as income for the purposes of the federal income tax. The Commissioner of Internal Revenue increased the 1952, 1953 and 1954 ordinary income of the taxpayers [1] by including in gross income for those years amounts received or receivable under contracts executed during those years despite the fact that the contracts obligated taxpayers to render performance in subsequent periods. These increases produced tax deficiencies which the taxpayers unsuccessfully challenged in the Tax Court on the ground that the amounts could be deferred under their accounting method. On appeal, the Court of Appeals for the Eighth Circuit agreed with the taxpayers and reversed the Tax Court, 283 F. 2d 234, the decision having been rendered prior to ours in *American Automobile Assn.* v. *United States,* 367 U. S. 687. Following the *American Automobile Association* case, certiorari in this case was granted, the judgment of the lower court vacated, 367 U. S. 911, and the cause remanded for further consideration in light of *American Automobile Association.* 368 U. S. 873. In a *per curiam* opinion, the Court of Appeals held that in view of *American Automobile Association,* the taxpayers' accounting method "does not, for income tax purposes, clearly reflect income" and affirmed the judgment for the

[1] The controversy turns upon the accounting method employed by a partnership in which the taxpayers were equal partners. Since a partnership is not a taxable entity, the partners being liable in their individual capacities for their distributive share of partnership income, § 181, Int. Rev. Code of 1939; § 701, Int. Rev. Code of 1954, the proper statement of the partnership's income affects only the tax liabilities of the partners individually. However, as there is no other dispute in the case, for convenience the discussion will center upon the partnership's accounting method without further mention of its effect upon the respective tax liabilities of the partners.

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Commissioner, 296 F. 2d 721. We brought the case back once again to consider whether the lower court misapprehended the scope of *American Automobile Association*. 370 U. S. 902.

Taxpayers, husband and wife, formed a partnership to operate ballroom dancing studios (collectively referred to as "studio") pursuant to Arthur Murray, Inc., franchise agreements. Dancing lessons were offered under either of two basic contracts. The cash plan contract required the student to pay the entire down payment in cash at the time the contract was executed with the balance due in installments thereafter. The deferred payment contract required only a portion of the down payment to be paid in cash. The remainder of the down payment was due in stated installments and the balance of the contract price was to be paid as designated in a negotiable note signed at the time the contract was executed.

Both types of contracts provided that (1) the student should pay tuition for lessons in a certain amount, (2) the student should not be relieved of his obligation to pay the tuition, (3) no refunds would be made, and (4) the contract was noncancelable.[2] The contracts prescribed a specific number of lesson hours ranging from five to 1,200 hours and some contracts provided lifetime courses entitling the student additionally to two hours of lessons per month plus two parties a year for life. Although the contracts designated the period during which the lessons had to be taken, there was no schedule of specific dates, which were arranged from time to time as lessons were given.

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[2] Although the contracts stated they were noncancelable, the studio frequently rewrote contracts reducing the number of lessons for a smaller sum of money. Also, despite the fact that the contracts provided that no refunds would be made, and despite the fact that the studio discouraged refunds, occasionally a refund would be made on a canceled contract.

Cash payments received directly from students and amounts received when the negotiable notes were discounted at the bank or fully paid [3] were deposited in the studio's general bank account without segregation from its other funds. The franchise agreements required the studio to pay to Arthur Murray, Inc., on a weekly basis, 10% of these cash receipts as royalty and 5% of the receipts in escrow, the latter to continue until a $20,000 indemnity fund was accumulated. Similarly, sales commissions for lessons sold were paid at the time the sales receipts were deposited in the studio's general bank account.

The studio, since its inception in 1946, has kept its books and reported income for tax purposes [4] on an accrual system of accounting. In addition to the books, individual student record cards were maintained showing the number of hours taught and the number still remaining under the contract. The system, in substance, operated as follows. When a contract was entered into, a "deferred income" account was credited for the total contract price. At the close of each fiscal period, the student record cards were analyzed and the total number of taught hours was multiplied by the designated rate per hour of each contract. The resulting sum was deducted from the deferred income account and reported as earned income

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[3] Notes taken from the students were ordinarily transferred, with full recourse, to a local bank which would deduct the interest charges and credit the studio with approximately 50% of the face amount. The remaining 50% was held in a reserve account, unavailable to the studio, until the note was fully paid, at which time the reserved amount was transferred to the studio's general bank account.

[4] Though the studio is not a taxable entity, it is still required to prepare and file an information return showing, *inter alia*, items of gross income and allowable deductions. § 187, 1939 Code; § 6031, 1954 Code.

on the financial statements and the income tax return. In addition, if there had been no activity in a contract for over a year, or if a course were reduced in amount, an entry would be made canceling the untaught portion of the contract, removing that amount from the deferred income account, and recognizing gain to the extent that the deferred income exceeded the balance due on the contract, *i. e.*, the amounts received in advance. The amounts representing lessons taught and the gains from cancellations constituted the chief sources of the partnership's gross income.[5] The balance of the deferred income account would be carried forward into the next fiscal year to be increased or decreased in accordance with the number of new contracts, lessons taught and cancellations recognized.

Deductions were also reported on the accrual basis except that the royalty payments and the sales commissions were deducted when paid irrespective of the period in which the related receipts were taken into income. Three certified public accountants testified that in their opinion the accounting system employed truly reflected net income in accordance with commercial accrual accounting standards.

The Commissioner included in gross income for the years in question not only advance payments received in

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[5] The following schedule reflects ordinary net income on the studio's books and returns:

| | 1952 | 1953 | 1954 |
|---|---|---|---|
| Gross income: | | | |
| Contract amounts transferred to earned income.. | $143,949.63 | $243,277.46 | $325,266.97 |
| Gains from cancellation... | 26,861.40 | 19,483.36 | 28,448.61 |
| Other income..... | 4,041.21 | 11,426.23 | 16,987.31 |
| Total..... | 174,852.24 | 274,187.05 | 370,702.89 |
| Deductions..... | 137,267.91 | 223,390.69 | 301,609.76 |
| Ordinary net income..... | 37,584.33 | 50,796.36 | 69,093.13 |

cash but the full face amounts of notes and contracts executed during the respective years. The Tax Court and the Court of Appeals upheld the Commissioner, but the United States in this Court has retreated somewhat and does not now claim the includibility in gross income of future payments which were not evidenced by a note and which were neither due by the terms of the contract nor matured by performance of the related services.[6] The question remaining for decision, then, is this: Was it proper for the Commissioner, exercising his discretion under § 41,[7] 1939 Code, and § 446 (b),[8] 1954 Code,

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[6] "Upon reconsideration, however, we concede the error of accruing future payments which are neither due as a matter of contract, nor matured by performance of the related services. Indeed, the Studio's right to collect the installment on its due date depends on its continuing ability and willingness to perform. Until that time, its right to receive payment has not fully ripened." Brief for the United States, p. 67.

[7] "SEC. 41. GENERAL RULE.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

[8] "SEC. 446. GENERAL RULE FOR METHODS OF ACCOUNTING.

"(a) GENERAL RULE.—Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

"(b) EXCEPTIONS.—If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such

to reject the studio's accounting system as not clearly reflecting income and to include as income in a particular year advance payments by way of cash, negotiable notes and contract installments falling due but remaining unpaid during that year? We hold that it was since we believe the problem is squarely controlled by *American Automobile Association*, 367 U. S. 687.

The Court there had occasion to consider the entire legislative background of the treatment of prepaid income. The retroactive repeal of § 452 of the 1954 Code, "the only law incontestably permitting the practice upon which [the taxpayer] depends," was regarded as reinstating long-standing administrative and lower court rulings that accounting systems deferring prepaid income could be rejected by the Commissioner.

> "[T]he fact is that § 452 for the first time specifically declared petitioner's system of accounting to be acceptable for income tax purposes, and overruled the long-standing position of the Commissioner and courts to the contrary. And the repeal of the section the following year, upon insistence by the Treasury that the proposed endorsement of such tax accounting would have a disastrous impact on the Government's revenue, was just as clearly a mandate from the Congress that petitioner's system was not acceptable for tax purposes." 367 U. S., at 695.

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method as, in the opinion of the Secretary or his delegate, does clearly reflect income.

"(c) PERMISSIBLE METHODS.—Subject to the provisions of subsections (a) and (b), a taxpayer may compute taxable income under any of the following methods of accounting—

"(1) the cash receipts and disbursements method;

"(2) an accrual method;

"(3) any other method permitted by this chapter; or

"(4) any combination of the foregoing methods permitted under regulations prescribed by the Secretary or his delegate."

Confirming that view was the step-by-step approach of Congress in granting the deferral privilege to only limited groups of taxpayers while exploring more deeply the ramifications of the entire problem.

Plainly, the considerations expressed in *American Automobile Association* are apposite here. We need only add here that since the *American Automobile Association* decision, a specific provision extending the deferral practice to certain membership corporations was enacted, § 456, 1954 Code, added by § 1, Act of July 26, 1961, 75 Stat. 222, continuing, at least so far, the congressional policy of treating this problem by precise provisions of narrow applicability. Consequently, as in the *American Automobile Association* case, we invoke the "long-established policy of the Court in deferring, where possible, to congressional procedures in the tax field," and, as in that case, we cannot say that the Commissioner's rejection of the studio's deferral system was unsound.

The *American Automobile Association* case rested upon an additional ground which is also controlling here. Relying upon *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180, the Court rejected the taxpayer's system as artificial since the advance payments related to services which were to be performed only upon customers' demands without relation to fixed dates in the future. The system employed here suffers from that very same vice, for the studio sought to defer its cash receipts on the basis of contracts which did not provide for lessons on fixed dates after the taxable year, but left such dates to be arranged from time to time by the instructor and his student. Under the contracts, the student could arrange for some or all of the additional lessons or could simply allow their rights under the contracts to lapse. But even though the student did not demand the remaining lessons, the contracts permitted the studio to insist upon payment in accordance with the obligations undertaken and to retain

whatever prepayments were made without restriction as to use and without obligation of refund. At the end of each period, while the number of lessons taught had been meticulously reflected, the studio was uncertain whether none, some or all of the remaining lessons would be rendered. Clearly, services were rendered solely on demand in the fashion of the *American Automobile Association* and *Automobile Club of Michigan* cases.[9]

Moreover, percentage royalties and sales commissions for lessons sold, which were paid as cash was received from students or from its note transactions with the bank, were deducted in the year paid even though the related items of income had been deferred, at least in part, to later periods. In view of all these circumstances, we hold the studio's accrual system vulnerable under § 41 and § 446 (b) with respect to its deferral of prepaid income. Consequently, the Commissioner was fully justified in including payments in cash or by negotiable note[10] in gross income for the year in which such payments were received. If these payments are includible in the year of receipt because their allocation to a later year does not clearly reflect income, the contract installments are likewise includible in gross income, as the United States now

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[9] The treatment of "gains from cancellations" underlines this aspect of the case. These gains, representing amounts paid or promised in advance of lessons given, were recognized in those periods in which the taxpayers arbitrarily decided the contracts were to be deemed canceled. The studio made no attempt to report estimated cancellations in the year of receipt, choosing instead to defer these gains to periods bearing no economic relationship to the income recognized. Cf. *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290.

[10] Negotiable notes are regarded as the equivalent of cash receipts, to the extent of their fair market value, for the purposes of recognition of income. § 39.22 (a)–4, Treas. Reg. 118, 1939 Code; § 1.61–2 (d)(4), Treas. Reg., 1954 Code; Mertens, Federal Income Taxation (1961), § 11.07. See *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462.

claims, in the year they become due and payable. For an accrual basis taxpayer "it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income," *Spring City Co.* v. *Commissioner,* 292 U. S. 182, 184; *Commissioner* v. *Hansen,* 360 U. S. 446, and here the right to receive these installments had become fixed at least at the time they were due and payable.

We affirm the Court of Appeals insofar as that court held includible the amounts representing cash receipts, notes received and contract installments due and payable. Because of the Commissioner's concession, we reverse that part of the judgment which included amounts for which services had not yet been performed and which were not due and payable during the respective periods and we remand the case with directions to return the case to the Tax Court for a redetermination of the proper income tax deficiencies now due in light of this opinion.

*It is so ordered.*

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE GOLDBERG join, dissenting.

As the Court notes, this case is but the most recent episode in a protracted dispute concerning the proper income tax treatment of amounts received as advances for services to be performed in a subsequent year by a taxpayer who is on an accrual rather than a cash basis. The Government has consistently argued that such amounts are taxable in the year of receipt, relying upon two alternative arguments: It has claimed that deferral of such payments would violate the "annual accounting" principle which requires that income not be postponed from one year to the next to reflect the long-term economic result of a transaction. Alternatively, the Government

has argued that advance payments must be reported as income in the year of receipt under the "claim-of-right doctrine," which requires otherwise reportable income, held under a claim of right without restriction as to use, to be reported when received despite the fact that the taxpayer's claim to the funds may be disputed.[1]

As I have elsewhere pointed out, neither of these doctrines has any relevance to the question whether any reportable income at all has been derived when payments are received in advance of performance by an accrual-basis taxpayer.[2] The most elementary principles of accrual accounting require that advances be considered reportable income only in the year they are earned by the taxpayer's rendition of the services for which the payments were made. The Government's theories would

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[1] The Commissioner has sometimes been successful in urging the "claim-of-right doctrine" as a bar to the deferral of advances by accrual-basis taxpayers. See, *e. g.*, *Andrews* v. *Commissioner*, 23 T. C. 1026, 1032–1033; *South Dade Farms* v. *Commissioner*, 138 F. 2d 818 (C. A. 5th Cir.); *Clay Sewer Pipe Assn.* v. *Commissioner*, 139 F. 2d 130 (C. A. 3d Cir.); *Automobile Club of Michigan* v. *Commissioner*, 230 F. 2d 585, 591 (C. A. 6th Cir.), aff'd on other grounds, 353 U. S. 180.

In more recent cases, on the other hand, the Courts of Appeals have held the claim-of-right doctrine irrelevant to this problem. *Bressner Radio, Inc.*, v. *Commissioner*, 267 F. 2d 520, 524, 525–528 (C. A. 2d Cir.); *Schuessler* v. *Commissioner*, 230 F. 2d 722, 725 (C. A. 5th Cir.); *Beacon Publishing Co.* v. *Commissioner*, 218 F. 2d 697, 699–701 (C. A. 10th Cir.).

In the present case the Commissioner urged that the "claim-of-right doctrine" was applicable even to advance fees which were due under the contract but not yet paid, a position from which he receded only when the case reached this Court. The Tax Court, at least in one case, has accepted the argument. *Your Health Club, Inc.*, v. *Commissioner*, 4 T. C. 385.

[2] See *American Automobile Assn.* v. *United States*, 367 U. S. 687, at 699–702 (dissenting opinion).

force upon an accrual-basis taxpayer a cash basis for advance payments in disregard of the federal statute which explicitly authorizes income tax returns to be based upon sound accrual accounting methods.[3]

Apparently the Court agrees that neither the annual accounting requirement nor the claim-of-right doctrine has any relevance or applicability to the question involved in this case. For the Court does not base its decision on either theory, but rather, as in two previous cases,[4] upon the ground that the system of accrual accounting used by these particular taxpayers does not "clearly reflect income" in accord with the statutory command.[5] This result is said to be compelled both by a consideration of legislative history and by an analysis of the particular accounting system which these taxpayers employed.

For the reasons I have elsewhere stated at some length,[6] to rely on the repeal of §§ 452 and 462 as indicating con-

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[3] "SEC. 446. GENERAL RULE FOR METHODS OF ACCOUNTING.

"(a) GENERAL RULE.—Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

"(b) EXCEPTIONS.—If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income.

"(c) PERMISSIBLE METHODS.—Subject to the provisions of subsections (a) and (b), a taxpayer may compute taxable income under any of the following methods of accounting—

. . . . . .

"(2) an accrual method; . . . ."

[4] *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180, and *American Automobile Assn.* v. *United States,* 367 U. S. 687.

[5] See note 3, *supra.* See also § 41, 1939 Code.

[6] See *American Automobile Assn.* v. *United States,* 367 U. S., at 703–711 (dissenting opinion).

gressional disapproval of accrual accounting principles is conspicuously to disregard clear evidence of legislative intent. The Secretary of the Treasury, who proposed the repeal of these sections, made explicitly clear that no inference of disapproval of accrual accounting principles was to be drawn from the repeal of the sections.[7] So did the Senate Report.[8] The repeal of these sections was occasioned solely by the fear of temporary revenue losses which would result from the taking of "double deductions" during the year of transition by taxpayers who had not previously maintained their books on an accrual basis.[9]

The Court's decision can be justified, then, only upon the basis that the system of accrual accounting used by the taxpayers in this case did not "clearly reflect income" in accordance with the command of § 41. In the *Automobile Club of Michigan* case[10] the taxpayer allocated yearly dues ratably over 12 months, so that only a portion of the dues received during any fiscal year was reported as income for that year. In the absence of any proof that services demanded by the Automobile Club members were distributed in the same proportion over the year, the Court held that the system used by the taxpayer did not clearly reflect income. In the *American Automobile Association* case[11] the taxpayer offered statistical proof to show that its proration of dues reasonably matched the proportion of its yearly costs incurred each month in rendering services attributable to those dues. The Court discounted the validity of this statistical evidence because

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[7] H. R. Rep. No. 293, 84th Cong., 1st Sess. 5.

[8] S. Rep. No. 372, 84th Cong., 1st Sess. 5–6. See also H. R. Rep. No. 293, 84th Cong., 1st Sess. 4–5.

[9] Since the taxpayers in the present case have consistently maintained their books on an accrual basis, they could not have taken advantage of a "double deduction" even under the repealed sections.

[10] 353 U. S. 180.

[11] 367 U. S. 687.

the amount and timing of the services demanded were wholly within the control of the individual members of the Association, and the Court thought that the Association could not, therefore, estimate with accuracy the costs attributable to each individual member's demands.

In the present case the difficulties which the Court perceived in *Automobile Club of Michigan* and *American Automobile Association* have been entirely eliminated in the accounting system which these taxpayers have consistently employed. The records kept on individual students accurately measured the amount of services rendered—and therefore the costs incurred by the taxpayer—under each individual contract during each taxable year. But, we are told, there is a fatal flaw in the taxpayers' accounts in this case too: The individual contracts did not provide "for lessons on fixed dates . . . , but left such dates to be arranged from time to time by the instructor and his student." Yet this "fixed date of performance" standard, it turns out, actually has nothing whatever to do with those aspects of the taxpayers' accounting system which the Court ultimately finds objectionable.

There is nothing in the Court's opinion to indicate disapproval of the basic method by which income earned by the rendition of services was recorded. On the contrary, the taxpayers' system was admittedly wholly accurate in recording lessons given under each individual contract. It was only in connection with lessons which had not yet been taught that the taxpayers were "uncertain whether none, some or all" of the contractual services would be rendered, and the condemned "arbitrariness" therefore is limited solely to the method by which cancellations were recognized.[12] It is, of course, true of all businesses in

[12] The Court also urges that the taxpayers' treatment of the commissions paid to sales personnel and royalties paid to Arthur Murray, Inc., were inconsistent with an accrual accounting system. It should

which services are not rendered simultaneously with payment that the number and amount of cancellations are necessarily unknown at the time advances are received. But surely it cannot be contended that a contract which specified the times at which lessons were to be given would make any more certain how many of the remaining lessons students would in fact demand. Indeed, the Court does not suggest that a schedule fixing the dates of all future lessons would, if embodied in each contract, suffice to make petitioners' accounting system "clearly reflect income."

Instead, the cure suggested by the Court for the defect which it finds in the accounting system used by these taxpayers is that estimated cancellations should be reported as income in the year advance payments are received. I agree that such estimates might more "clearly reflect income" than the system actually used by the taxpayers. But any such estimates would necessarily have to be based on precisely the type of statistical evaluations which the Court struck down in the *American Automobile Association* case. Whatever other artificialities the exigencies of revenue collection may require in the field of tax accounting, it has never before today been suggested that a consistent method of accrual accounting, valid for purposes of recognizing income, is not equally valid for purposes of deferring income. Yet in this case the Court says that the taxpayers, in recognizing income, should have used the very system of statistical estimates which,

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be noted that § 1.461–1 (a)(3), Treas. Reg., 1954 Code, specifically provides: ". . . However, in a going business there are certain overlapping deductions. If these overlapping items do not materially distort income, they may be included in the years in which the taxpayer consistently takes them into account." If, however, the Court is holding that these items do "materially distort income," then the case should be remanded for recomputation as to these items.

for income deferral purposes, the *American Automobile* decision held impermissible.

It seems to me that this decision, the third of a trilogy of cases purportedly decided on their own peculiar facts, in truth completes the mutilation of a basic element of the accrual method of reporting income—a method which has been explicitly approved by Congress for almost half a century.[13]

I respectfully dissent.

[13] See § 13 (d) of the Revenue Act of 1916, 39 Stat. 771.

# KENNEDY, ATTORNEY GENERAL, *v.* MENDOZA-MARTINEZ.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 2. Argued October 10–11, 1961.—Restored to the calendar for reargument April 2, 1962.—Reargued December 4, 1962.—Decided February 18, 1963.*

Both appellees are native-born citizens of the United States. Mendoza-Martinez was ordered deported as an alien and Cort was denied a passport to enable him to return to the United States, both on the ground that they had lost their citizenship by remaining outside of the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the Nation's armed forces. Both sued for relief in Federal District Courts, which rendered judgments declaring that the relevant statutes, § 401 (j) of the Nationality Act of 1940, as amended, and § 349 (a) (10) of the Immigration and Nationality Act of 1952, are unconstitutional. Mendoza-Martinez' case was tried by a single-judge District Court, which granted no injunction. Cort's case was tried by a three-judge District Court, which enjoined the Secretary of State from denying him a passport on the ground that he was not a citizen. *Held:* The judgments are affirmed. Pp. 146–186.

1. Although Mendoza-Martinez amended his complaint so as to add a prayer for injunctive relief before the third trial of his case by a single-judge District Court, it is clear from the trial record that the issues were framed and the case handled so as actually not to contemplate any injunctive relief. In these circumstances, it was not necessary for the case to be heard by a three-judge District Court convened pursuant to 28 U. S. C. § 2282. Pp. 152–155.

2. The trial and conviction of Mendoza-Martinez for violating § 11 of the Selective Training and Service Act of 1940 by going to Mexico "on or about November 15, 1942 . . . for the purpose

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*Together with No. 3, *Rusk, Secretary of State,* v. *Cort,* on appeal from the United States District Court for the District of Columbia, argued October 11, 1961, decided in part and set for reargument April 2, 1962, reargued December 4–5, 1962.

of evading service" did not involve any determination of his citizenship status, and therefore did not estop the Government from denying his citizenship subsequently. Pp. 155–158.

3. Section 401 (j) of the Nationality Act of 1940, as amended, and § 349 (a) (10) of the Immigration and Nationality Act of 1952, which purport to deprive an American of his citizenship, automatically and without any prior judicial or administrative proceedings, for "departing from or remaining outside of the jurisdiction of the United States in time of war or . . . national emergency for the purpose of evading or avoiding training and service" in the Nation's armed forces, are unconstitutional, because they are essentially penal in character and would inflict severe punishment without due process of law and without the safeguards which must attend a criminal prosecution under the Fifth and Sixth Amendments. Pp. 159–186.

(a) The great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. Pp. 164–165.

(b) It is conceded that §§ 401 (j) and 349 (a) (10) would automatically strip an American of his citizenship, without any administrative or judicial proceedings whatever, whenever he departs from or remains outside the jurisdiction of this country for the purpose of evading his military obligations. Pp. 166–167.

(c) The punitive nature of the sanctions imposed by these sections is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, and it is clear from a consideration of the legislative and judicial history of these sections and their predecessors that in them Congress employed the sanction of forfeiture of citizenship as a punishment for the offense of leaving or remaining outside the country to evade military service. Pp. 163–184.

(d) Such punishment may not constitutionally be inflicted without a prior criminal trial with all the safeguards guaranteed by the Fifth and Sixth Amendments, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. Pp. 167, 184, 186.

192 F. Supp. 1 and 187 F. Supp. 683, affirmed.

*Bruce J. Terris* reargued the cause for appellant in No. 2. *J. William Doolittle* reargued the cause for appellant in No. 3. On the briefs in both cases were *Solicitor Gen-*

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*eral Cox, Assistant Attorney General Miller, Oscar H. Davis, Beatrice Rosenberg* and *Jerome M. Feit.*

*Thomas R. Davis* reargued the cause for appellee in No. 2. With him on the brief was *John W. Willis.*

*Leonard B. Boudin* reargued the cause for appellee in No. 3. With him on the brief was *Victor Rabinowitz.*

*Jack Wasserman, David Carliner, Rowland Watts, Stephen J. Pollak* and *Osmond K. Fraenkel* filed briefs for the American Civil Liberties Union, as *amicus curiae,* urging affirmance in both cases.

*Milton V. Freeman, Robert E. Herzstein, Horst Kurnik* and *Charles A. Reich* filed a brief, urging affirmance in No. 3, for Angelika Schneider, as *amicus curiae.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

We are called upon in these two cases to decide the grave and fundamental problem, common to both, of the constitutionality of Acts of Congress which divest an American of his citizenship for "[d]eparting from or remaining outside of the jurisdiction of the United States in time of war or . . . national emergency for the purpose of evading or avoiding training and service" in the Nation's armed forces.[1]

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[1] In question in No. 2, *Kennedy* v. *Mendoza-Martinez,* is § 401 (j) of the Nationality Act of 1940, added in 1944, 58 Stat. 746, which reads in full as follows:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . .

"(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States." [*Footnote 1 continued on p. 147*]

## I. The Facts.

### A. *Mendoza-Martinez—No. 2.*

The facts of both cases are not in dispute. Mendoza-Martinez, the appellee in No. 2, was born in this country in 1922 and therefore acquired American citizenship by birth. By reason of his parentage, he also, under Mexican law, gained Mexican citizenship, thereby possessing dual nationality. In 1942 he departed from this country and went to Mexico solely, as he admits, for the purpose of evading military service in our armed forces. He concedes that he remained there for that sole purpose until November 1946, when he voluntarily returned to this country. In 1947, in the United States District Court for the Southern District of California, he pleaded guilty to and was convicted of evasion of his service obligations in violation of § 11 of the Selective Training and Service Act of 1940.[2] He served the imposed sentence of a year and a day. For all that appears in the record, he was, upon his release, allowed to reside undisturbed in this country until

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Its successor and counterpart, § 349 (a) (10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267–268, 8 U. S. C. § 1481 (a) (10), is challenged in No. 3, *Rusk* v. *Cort*, and reads as follows:

"From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by— . . .

"(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

[2] 54 Stat. 894, as amended, 50 U. S. C. App. (1946 ed.) § 311.

1953, when, after a lapse of five years, he was served with a warrant of arrest in deportation proceedings. This was premised on the assertion that, by remaining outside the United States to avoid military service after September 27, 1944, when § 401 (j) took effect, he had lost his American citizenship. Following hearing, the Attorney General's special inquiry officer sustained the warrant and ordered that Mendoza-Martinez be deported as an alien. He appealed to the Board of Immigration Appeals of the Department of Justice, which dismissed his appeal.

Thereafter, Mendoza-Martinez brought a declaratory judgment action in the Federal District Court for the Southern District of California, seeking a declaration of his status as a citizen, of the unconstitutionality of § 401 (j), and of the voidness of all orders of deportation directed against him. A single-judge District Court in an unreported decision entered judgment against Mendoza-Martinez in 1955, holding that by virtue of § 401 (j), which the court held to be constitutional, he had lost his nationality by remaining outside the jurisdiction of the United States after September 27, 1944. The Court of Appeals for the Ninth Circuit affirmed the judgment, 238 F. 2d 239. This Court, in 1958, *Mendoza-Martinez* v. *Mackey,* 356 U. S. 258, granted certiorari, vacated the judgment, and remanded the cause to the District Court for reconsideration in light of its decision a week earlier in *Trop* v. *Dulles,* 356 U. S. 86.

On September 24, 1958, the District Court announced its new decision, also unreported, that in light of *Trop* § 401 (j) is unconstitutional because not based on any "rational nexus . . . between the content of a specific power in Congress and the action of Congress in carrying that power into execution." On direct appeal under 28 U. S. C. § 1252, this Court noted probable jurisdiction, 359 U. S. 933, and then of its own motion remanded the cause, this time with permission to the parties to amend

the pleadings to put in issue the question of whether the facts as determined on the draft-evasion conviction in 1947 collaterally estopped the Attorney General from now claiming that Mendoza-Martinez had lost his American citizenship while in Mexico. *Mackey* v. *Mendoza-Martinez*, 362 U. S. 384.

The District Court on remand held that the Government was not collaterally estopped because the 1947 criminal proceedings entailed no determination of Mendoza-Martinez' citizenship. The court, however, reaffirmed its previous holding that § 401 (j) is unconstitutional, adding as a further basis of invalidity that § 401 (j) is "essentially penal in character and deprives the plaintiff of procedural due process. . . . [T]he requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings." [3] The Attorney General's current appeal is from this decision. Probable jurisdiction was noted on February 20, 1961, 365 U. S. 809. The case was argued last Term, and restored to the calendar for reargument this Term, 369 U. S. 832.

B. *Cort—No. 3.*

Cort, the appellee in No. 3, is also a native-born American, born in Boston in 1927. Unlike Mendoza-Martinez, he has no dual nationality. His wife and two young children are likewise American citizens by birth. Following receipt of his M. D. degree from the Yale University School of Medicine in 1951, he went to England for the purpose of undertaking a position as a Research Fellow at Cambridge University. He had earlier registered in timely and proper fashion for the draft and shortly before

[3] The memorandum opinion in which the quoted statement appears is unreported, but the findings of fact, conclusions of law, and judgment of the court are reported at 192 F. Supp. 1.

his departure supplemented his regular Selective Service registration by registering under the newly enacted Doctors Draft Act.[4] In late 1951 he received a series of letters from the American Embassy in London instructing him to deliver his passport to it to be made "valid only for return to the United States." He did not respond to these demands because, he now says in an affidavit filed in the trial court in this proceeding, "I believed that they were unlawful and I did not wish to subject myself to this and similar forms of political persecution then prevalent in the United States. . . . I was engaged in important research and teaching work in physiology and I desired to continue earning a livelihood for my family." Cort had been a member of the Communist Party while he was a medical student at Yale from 1946 to 1951, except for the academic year 1948–1949 when he was in England. In late 1952, while still in England at Cambridge, he accepted a teaching position for the following academic year at Harvard University Medical School. When, however, the school discovered through further correspondence that he had not yet fulfilled his military obligations, it advised him that it did not regard his teaching position as essential enough to support his deferment from military service in order to enter upon it. Thereafter, his local draft board in Brookline, Massachusetts, notified him in February 1953 that his request for deferment was denied and that he should report within 30 days for a physical examination either in Brookline or in Frankfurt, Germany. On June 4 and on July 3 the draft board again sent Cort notices to report for a physical examination, the first notice for examination on July 1 in Brookline, and the second for examination within 30 days in Frankfurt. He did not appear at either place, and the board on August 13 ordered him to report for induction on September 14,

[4] 64 Stat. 826, 50 U. S. C. App. § 454 *et seq.*

1953. He did not report, and consequently he was indicted in December 1954 for violation of § 12 (a) of the Selective Service Act of 1948 [5] by reason of his failure to report for induction. This indictment is still outstanding. His complaint in this action states that he did not report for induction because he believed "that the induction order was not issued in good faith to secure his military services, that his past political associations and present physical disabilities made him ineligible for such service, and that he was being ordered to report back to the United States to be served with a Congressional committee subpoena or indicted under the Smith Act . . . ." Meanwhile, the British Home Office had refused to renew his residence permit, and in mid-1954 he and his family moved to Prague, Czechoslovakia, where he took a position as Senior Scientific Worker at the Cardiovascular Institute. He has lived there since.

In April 1959, his previous United States passport having long since expired, Cort applied at the American Embassy in Prague for a new one. His complaint in this action states that he wanted the passport "in order to return to the United States with his wife and children so that he might fulfill his obligations under the Selective Service laws and his wife might secure medical treatment for multiple sclerosis." Mrs. Cort received a passport and came to this country temporarily in late 1959, both for purposes of medical treatment and to facilitate arrangements for her husband's return. Cort's application, however, was denied on the ground that he had, by his failure to report for induction on September 14, 1953, as ordered, remained outside the country to avoid military service and thereby automatically forfeited his American citizenship by virtue of § 349 (a)(10) of the Immigration

[5] 62 Stat. 622, 50 U. S. C. App. § 462 (a). The short title of the Act has since 1951 been the Universal Military Training and Service Act. 65 Stat. 75, 50 U. S. C. App. § 451 (a).

and Nationality Act of 1952, which had superseded § 401 (j). The State Department's Passport Board of Review affirmed the finding of expatriation, and the Department's legal adviser affirmed the decision. Cort, through counsel, thereupon brought this suit in the District Court for the District of Columbia for a declaratory judgment that he is a citizen of the United States, for an injunction against enforcement of § 349 (a)(10) because of its unconstitutionality, and for an order directing revocation of the certificate of loss of nationality and issuance of a United States passport to him. Pursuant to Cort's demand, a three-judge court was convened. The court held that he had remained outside the United States to evade military service, but that § 349 (a)(10) is unconstitutional because "We perceive no substantial difference between the constitutional issue in the Trop case and the one facing us." It therefore concluded that Cort is a citizen of this country and enjoined the Secretary of State from withholding a passport from Cort on the ground that he is not a citizen and from otherwise interfering with his rights of citizenship. *Cort* v. *Herter,* 187 F. Supp. 683.

The Secretary of State appealed directly to this Court, 28 U. S. C. §§ 1252, 1253, which postponed the question of jurisdiction to the hearing of the case on the merits. 365 U. S. 808. The preliminary question of jurisdiction was affirmatively resolved last Term, *Rusk* v. *Cort,* 369 U. S. 367, leaving the issue of the validity of § 349 (a)(10) for decision now, after reargument. 369 U. S., at 380.

Before we consider the essential question in these cases, the constitutionality of §§ 401 (j) and 349 (a)(10), two preliminary issues peculiar to No. 2 must be discussed.

## II. The Three-Judge Court Issue.

At the threshold in Mendoza-Martinez' case is the question whether the proceeding should have been heard by a three-judge District Court convened pursuant to 28

U. S. C. § 2282, which requires such a tribunal as a prerequisite to the granting of any "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States . . . ." If § 2282 governs this litigation, we are once again faced with the prospect of a remand and a new trial, this time by a three-judge panel. We are, however, satisfied that the case was properly heard by a single district judge, as both parties urge.

In the complaint under which the case was tried the first and second times, Mendoza-Martinez asked for no injunctive relief, and none was granted. In the amended complaint which he filed in 1960 to put in issue the question of collateral estoppel, he added a prayer asking the court to adjudge "that defendants herein are enjoined and restrained henceforth from enforcing" all deportation orders against him. However, it is abundantly clear from the amended trial stipulation which was entered into by the parties and approved by the judge to "govern the course of the trial," that the issues were framed so as not to contemplate any injunctive relief. The first question was articulated only in terms of whether the Government was "herein estopped by reason of the indictment and conviction of plaintiff for [draft evasion] . . . from denying that the plaintiff is now a national and citizen of the United States." The second question asked only for a declaration as to whether § 401 (j) was "unconstitutional, either on its face or as applied to the plaintiff herein." The conclusion that no request for injunctive relief nor even any contemplation of it attended the case as it went to trial is borne out by the total lack of reference to injunctive relief in the District Court's memorandum opinion, findings of fact and conclusions of law, and judgment. See 192 F. Supp. 1. The relief granted was merely a declaration that the 1944 Amendment "is

unconstitutional, both on its face and as applied to the plaintiff herein," and "[t]hat the plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States." Thus, despite the amendment to Mendoza-Martinez' complaint before the third trial, it is clear that neither the parties nor the judge at any relevant time regarded the action as one in which injunctive relief was material to the disposition of the case. Since no injunction restraining the enforcement of § 401 (j) was at issue, § 2282 was not in terms applicable to require the convening of a three-judge District Court.

Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case the congressional policy underlying the statute was not frustrated by trial before a single judge. The legislative history of § 2282 and of its complement, § 2281,[6] requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. Section 2281 "was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. . . . The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress . . . ." *Phillips* v. *United States,* 312 U. S. 246,

[6] In more detail, 28 U. S. C. § 2281 requires a three-judge court to be convened in order to grant "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes . . . upon the ground of the unconstitutionality of such statute . . . ."

250–251. Repeatedly emphasized during the congressional debates on § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479–481, 2142–2143 (1937).

The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained. Thus there was no reason whatever in this case to invoke the special and extraordinary procedure of a three-judge court. Compare *Schneider* v. *Rusk, post,* p. 224, decided this day.

### III. The Collateral-Estoppel Issue.

Mendoza-Martinez' second amended complaint, filed in 1960 pursuant to the suggestion of this Court earlier that year, charged that "the government of the United States

has admitted the fact of his United States citizenship by virtue of the indictment and judgment of conviction [in 1947 for draft evasion] . . . and is therefore collaterally estopped now to deny such citizenship . . . ." The District Court rejected this assertion. Mendoza-Martinez renews it here as an alternative ground for upholding the judgment entered below "That the plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States." 192 F. Supp., at 3.

We too reject Mendoza-Martinez' contention on this point. His argument, stated more fully, is as follows: The Selective Training and Service Act of 1940 applies only to citizens and resident aliens. Both the indictment and the judgment spoke in terms of his having remained in Mexico for the entire period from November 15, 1942, until November 1, 1946, when he returned to this country.[7]

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[7] The indictment was in three counts, but Mendoza-Martinez was convicted only on Count I, which reads in full as follows:

"Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946."

The judgment and commitment, similarly, stated that Mendoza-Martinez was convicted of:

"Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st 1946."

For the period from September 27, 1944, when § 401 (j) became effective, until November 1, 1946, he could not have been in violation of our draft laws unless he remained a citizen of the United States, since the draft laws do not apply to nonresident aliens. Therefore, he concludes, the Government must be taken to have admitted that he did not lose his citizenship by remaining outside the country after September 27, 1944, because it charged him with draft evasion for that period as well as for the period preceding that date.

It is true that "as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered," *Cromwell* v. *County of Sac*, 94 U. S. 351, 353, the findings in a prior criminal proceeding may estop a party in a subsequent civil action, *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568–569, and that the United States may be estopped to deny even an erroneous prior determination of status, *United States* v. *Moser*, 266 U. S. 236. However, Mendoza-Martinez' citizenship status was not at issue in his trial for draft evasion. Putting aside the fact that he pleaded guilty, which in itself may support the conclusion that his citizenship status was not litigated and thereby without more preclude his assertion of estoppel,[8] the basic flaw in his argument is in the assertion that he was charged with a continuing violation of the draft laws while he remained in Mexico, particularly after September 27, 1944, the date on which § 401 (j) became effective. He was in fact charged with a violation "on or about November 15, 1942," because he "did knowingly evade service . . . in that he did knowingly depart from

[8] Compare *United States* v. *International Building Co.*, 345 U. S. 502, in which a prior judicial determination of a tax issue, based on the parties' stipulation, was refused collateral-estoppel effect in a later action. See also Restatement, Judgments, § 68, comments *g*, *h*, *i*.

the United States and go to a foreign country, namely: Mexico, for the purpose of evading service . . . ." This constituted the alleged violation. The additional language that he "did there remain until on or about November 1, 1946," was merely surplusage in relation to the substantive offense, although it might, for example, serve a purpose in relation to problems connected with the tolling of the statute of limitations. No language appears charging the elements of violation—knowledge and purpose to evade—in connection with it. The only crime charged is what happened "on or about November 15, 1942," and conviction thereon, even if it had entailed a finding as to Mendoza-Martinez' citizenship on that date,[9] in nowise estopped the Government with reference to his status after September 27, 1944.

The trial court's judgment was worded no differently. Mendoza-Martinez was convicted of:

> "Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st 1946."

Again, the language relating to the time during which Mendoza-Martinez remained in Mexico was not tied to the words stating knowledge and purpose to evade service. Thus, the conviction entailed no actual or necessary finding about Mendoza-Martinez' citizenship status between September 27, 1944, and November 1, 1946, and the Government was not estopped from denying his citizenship in the present proceedings.

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[9] Since the Selective Training and Service Act of 1940 applied both to citizens and resident aliens, there was no need to determine in which category Mendoza-Martinez fell "on or about November 15, 1942." In the present proceeding it is, of course, not disputed that Mendoza-Martinez was an American citizen on that date.

## IV. The Constitutional Issues.

### A. *Basic Principles.*

Since the validity of an Act of Congress is involved, we begin our analysis mindful that the function we are now discharging is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett* v. *Holden,* 275 U. S. 142, 148 (separate opinion of Holmes, J.). This responsibility we here fulfill with all respect for the powers of Congress, but with recognition of the transcendent status of our Constitution.

We deal with the contending constitutional arguments in the context of certain basic and sometimes conflicting principles. Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms.[10] The Constitution is silent about the permissibility of involuntary forfeiture of citizenship rights.[11] While it confirms citizenship rights, plainly there are imperative obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact. One of the most important of these is to serve the country in time of war and national emergency. The powers of Congress to require military service for the common defense are broad and far-reach-

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[10] U. S. Const., Amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ." This constitutional statement is to be interpreted in light of pre-existing common-law principles governing citizenship. *United States* v. *Wong Kim Ark,* 169 U. S. 649.

[11] There is, however, no disagreement that citizenship may be voluntarily relinquished or abandoned either expressly or by conduct. See, *e. g., Perez* v. *Brownell,* 356 U. S. 44, 48–49; *id.,* at 66–67 (Warren, C. J., dissenting).

ing,[12] for while the Constitution protects against invasions of individual rights, it is not a suicide pact. Similarly, Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to ensure effectuation of this indispensable function of government.[13]

These principles, stemming on the one hand from the precious nature of the constitutionally guaranteed rights of citizenship, and on the other from the powers of Congress and the related obligations of individual citizens, are urged upon us by the parties here. The Government argues that §§ 401 (j) and 349 (a)(10) are valid as an exercise of Congress' power over foreign affairs, of its war power, and of the inherent sovereignty of the Government. Appellees urge the provisions' invalidity as not within any of the powers asserted, and as imposing a cruel and unusual punishment.

We recognize at the outset that we are confronted here with an issue of the utmost import. Deprivation of citizenship—particularly American citizenship, which is "one of the most valuable rights in the world today," Report of the President's Commission on Immigration and Naturalization (1953), 235—has grave practical consequences. An expatriate who, like Cort, had no other nationality becomes a stateless person—a person who not only has no rights as an American citizen, but no membership in any national entity whatsoever. "Such individuals as do not possess any nationality enjoy, in general, no protection whatever, and if they are aggrieved by a State they have no means of redress, since there is no State which is competent to take up their case. As far as the Law of Na-

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[12] *Ex parte Quirin*, 317 U. S. 1, 25–26. See also *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426; *Hirabayashi* v. *United States*, 320 U. S. 81, 93.

[13] *Mackenzie* v. *Hare*, 239 U. S. 299, 311–312; *Perez* v. *Brownell*, *supra*, 356 U. S., at 57–58.

tions is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty . . . no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals." 1 Oppenheim, International Law (8th ed., Lauterpacht, 1955), § 291, at 640.[14] The calamity is "[n]ot the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever . . . ." Arendt, The Origins of Totalitarianism (1951), 294. The stateless person may end up shunted from nation to nation, there being no one obligated or willing to receive him,[15] or, as in Cort's case, may receive the dubious sanctuary of a Communist regime lacking the essential liberties precious to American citizenship.[16]

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[14] See also Garner, Uniformity of Law in Respect to Nationality, 19 Am. J. Int'l L. 547 (1925).

[15] See Seckler-Hudson, Statelessness: With Special Reference to the United States (1934), 244–253; Preuss, International Law and Deprivation of Nationality, 23 Geo. L. J. 250 (1934); Holborn, The Legal Status of Political Refugees, 1920–1938, 32 Am. J. Int'l L. 680 (1938). See also *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206.

[16] The drastic consequences of statelessness have led to reaffirmation in the United Nations Universal Declaration of Human Rights, Article 15, of the right of every individual to retain a nationality. U. N Doc. No. A/810, pp. 71, 74 (1948) (adopted by the U. N. General Assembly on Dec. 10, 1948), reprinted in UNESCO, Human Rights, A Symposium, App. III (1949). See also A Study on Statelessness, U. N. Doc. No. E/1112 (1949); Second Report on the Elimination or Reduction of Statelessness, U. N. Doc. No. A/CN. 4/75 (1953); Weis, The United Nations Convention on the Reduction of Statelessness, 1961, 11 Int'l & Comp. L. Q. 1073 (1962), and authorities cited therein.

The evils of statelessness were recognized in the Report of the President's Commission on Immigration and Naturalization (1953), 241, and the treatise writers have unanimously disapproved of statutes which denationalize individuals without regard to whether they have dual nationality. Borchard, Diplomatic Protection of Citizens

B. *The Perez and Trop Cases.*

The basic principles here involved, the gravity of the issue, and the arguments bearing upon Congress' power to forfeit citizenship were considered by the Court in relation to different provisions of the Nationality Act of 1940 in two cases decided on the same day less than five years ago: *Perez* v. *Brownell,* 356 U. S. 44, and *Trop* v. *Dulles,* 356 U. S. 86.

In *Perez,* § 401 (e), which imposes loss of nationality for "[v]oting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory," was upheld by a closely divided Court as a constitutional exercise of Congress' power to regulate foreign affairs. The Court reasoned that since withdrawal of citizenship of Americans who vote in foreign elections is reasonably calculated to effect the avoidance of embarrassment in the conduct of foreign relations, such withdrawal is within the power of Congress, acting under the Necessary and Proper Clause. Since the Court sustained the application of § 401 (e) to denationalize Perez, it did not have to deal with § 401 (j), upon which the Government had also relied, and it expressly declined to rule on the constitutionality of that section, 356 U. S., at 62. There were three opinions written in dissent. The principal one, that of THE CHIEF JUSTICE, recognized "that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country," *id.,* at 68, but concluded that "[t]he mere act of voting in a foreign election, however, without regard to the circumstances attending

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Abroad (1916), §§ 262, 334; Fenwick, International Law (3d ed. 1948), 263; 1 Oppenheim, *supra,* §§ 313–313a; Gettys, The Law of Citizenship in the United States (1934), 137–138, 160.

the participation, is not sufficient to show a voluntary abandonment of citizenship," *id.*, at 78.

In *Trop*, § 401 (g), forfeiting the citizenship of any American who is guilty of "[d]eserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged . . . ," was declared unconstitutional. There was no opinion of the Court. THE CHIEF JUSTICE wrote an opinion for four members of the Court, concluding that § 401 (g) was invalid for the same reason that he had urged as to § 401 (e) in his dissent in *Perez*, and that it was also invalid as a cruel and unusual punishment imposed in violation of the Eighth Amendment. JUSTICE BRENNAN conceded that it is "paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war," 356 U. S., at 105. Notwithstanding, he concurred because "the requisite rational relation between this statute and the war power does not appear . . . ," *id.*, at 114. Justice Frankfurter, joined by three other Justices, dissented on the ground that § 401 (g) did not impose punishment at all, let alone cruel and unusual punishment, and was within the war powers of Congress.

C. *Sections 401 (j) and 349 (a)(10) as Punishment.*

The present cases present for decision the constitutionality of a section not passed upon in either *Perez* or *Trop*—§ 401 (j), added in 1944, and its successor and present counterpart, § 349 (a)(10) of the Immigration and Nationality Act of 1952. We have come to the conclusion that there is a basic question in the present cases,

the answer to which obviates a choice here between the powers of Congress and the constitutional guarantee of citizenship. That issue is whether the statutes here, which automatically—without prior court or administrative proceedings—impose forfeiture of citizenship, are essentially penal in character, and consequently have deprived the appellees of their citizenship without due process of law and without according them the rights guaranteed by the Fifth and Sixth Amendments, including notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel. This issue was not relevant in *Trop* because, in contrast to §§ 401 (j) and 349 (a)(10), § 401 (g) required conviction by court-martial for desertion before forfeiture of citizenship could be inflicted. In *Perez* the contention that § 401 (e) was penal in character was impliedly rejected by the Court's holding, based on legislative history totally different from that underlying §§ 401 (j) and 349 (a)(10), that voting in a political election in a foreign state "is regulable by Congress under its power to deal with foreign affairs." 356 U. S., at 59. Compare *Dent* v. *West Virginia,* 129 U. S. 114; *Hawker* v. *New York,* 170 U. S. 189; *Flemming* v. *Nestor,* 363 U. S. 603. Indeed, in *Trop* THE CHIEF JUSTICE observed that "Section 401 (j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed . . . ," 356 U. S., at 94, and Justice Frankfurter in dissent alluded to the due process overtones of the requirement in § 401 (g) of prior conviction for desertion by court-martial, *id.*, at 116–117.

It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due

process.[17] The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan,* 4 Wall. 2, 120–121.[18] The rights guaranteed by the Fifth and Sixth Amendments are "preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service." *Id.,* at 123.[19] "[I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." *Id.,* at 124.

We hold §§ 401 (j) and 349 (a)(10) invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade mili-

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[17] War powers: *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 88; *Ex parte Endo,* 323 U. S. 283, 298–300. Foreign-affairs powers: *Kent* v. *Dulles,* 357 U. S. 116, 125–130; *Shachtman* v. *Dulles,* 96 U. S. App. D. C. 287, 225 F. 2d 938 (1955).

[18] See also *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156; *United States* v. *Cohen Grocery Co., supra; Ex parte Endo, supra.*

[19] Compare *Ex parte Mason,* 105 U. S. 696; *Kahn* v. *Anderson,* 255 U. S. 1, 8–9; *Ex parte Quirin,* 317 U. S. 1, 29, 38–46.

tary service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.[20] Our forefathers "intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, [and] must be clearly informed of the charge against him . . . ." *United States* v. *Lovett*, 328 U. S. 303, 317. See also *Chambers* v. *Florida*, 309 U. S. 227, 235–238.

As the Government concedes, §§ 401 (j) and 349 (a) (10) automatically strip an American of his citizenship, with concomitant deprivation "of all that makes life worth living," *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–285, whenever a citizen departs from or remains outside the jurisdiction of this country for the purpose of evading his military obligations. Conviction for draft evasion, as

[20] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const., Amend. VI.

Cort's case illustrates, is not prerequisite to the operation of this sanction.[21] Independently of prosecution, forfeiture of citizenship attaches when the statutory set of facts develops. It is argued that the availability after the fact of administrative and judicial proceedings, including the machinery the Court approved last Term in *Rusk* v. *Cort*, 369 U. S. 367, to contest the validity of the sanction meets the measure of due process. But the legislative history and judicial expression with respect to every congressional enactment relating to the provisions in question dating back to 1865 establish that forfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.

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[21] Thus the fact that Mendoza-Martinez was, as it happened, convicted of draft evasion before deportation proceedings were brought against him is of no relevance. Even if the incidence of conviction for draft evasion were potentially relevant to the validity of §§ 401 (j) and 349 (a)(10), the fact is that the "crime" created by these sections includes an element not necessary to conviction for violation of § 11 of the Selective Training and Service Act of 1940—"[d]eparting from or remaining outside" the country "for the purpose of evading or avoiding [military] training and service . . . ." See Comment, Power of Congress to Effect Involuntary Expatriation, 56 Mich. L. Rev. 1142, 1166 n. 102 (1958). Mendoza-Martinez was thus never tried for any crime the elements of which are identical with or totally inclusory of those of § 401 (j), and hence was not even arguably accorded the procedural protections we here hold essential.

The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint,[22] whether it has historically been regarded as a punishment,[23] whether it comes into play only on a finding of *scienter*,[24] whether its operation will promote the traditional aims of punishment—retribution and deterrence,[25] whether the behavior to which it applies is already a crime,[26] whether an alternative purpose to which it may

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[22] *Ex parte Garland*, 4 Wall. 333, 377; *United States* v. *Lovett*, 328 U. S. 303, 316; *Flemming* v. *Nestor*, 363 U. S. 603, 617.

[23] *Cummings* v. *Missouri*, 4 Wall. 277, 320–321; *Ex parte Wilson*, 114 U. S. 417, 426–429; *Mackin* v. *United States*, 117 U. S. 348, 350–352; *Wong Wing* v. *United States*, 163 U. S. 228, 237–238. Reference to history here is peculiarly appropriate. Though not determinative, it supports our holding to note that forfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment. In ancient Rome, "There were many ways in which a man might lose his freedom, and with his freedom he necessarily lost his citizenship also. Thus he might be sold into slavery as an insolvent debtor, or condemned to the mines for his crimes as *servus poenae*." Salmond, Citizenship and Allegiance, 17 L. Q. Rev. 270, 276 (1901). Banishment was a weapon in the English legal arsenal for centuries, 4 Bl. Comm. *377, but it was always "adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice." Maxey, Loss of Nationality: Individual Choice or Government Fiat? 26 Albany L. Rev. 151, 164 (1962).

[24] *Helwig* v. *United States*, 188 U. S. 605, 610–612; *Child Labor Tax Case*, 259 U. S. 20, 37–38.

[25] *United States* v. *Constantine*, 296 U. S. 287, 295; *Trop* v. *Dulles*, *supra*, 356 U. S., at 96 (opinion of THE CHIEF JUSTICE); *id.*, at 111–112 (BRENNAN, J., concurring).

[26] *Lipke* v. *Lederer*, 259 U. S. 557, 562; *United States* v. *La Franca*, 282 U. S. 568, 572–573; *United States* v. *Constantine*, *supra*, 296 U. S., at 295.

rationally be connected is assignable for it,[27] and whether it appears excessive in relation to the alternative purpose assigned [28] are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.[29] A study of the history of the predecessor of § 401 (j), which "is worth a volume of logic," *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, coupled with a reading of Congress' reasons for enacting § 401 (j), compels a conclusion that the statute's primary function is to serve as an additional penalty for

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[27] *Cummings* v. *Missouri*, *supra*, 4 Wall., at 319; *Child Labor Tax Case*, *supra*, 259 U. S., at 43; *Lipke* v. *Lederer*, *supra*, 259 U. S., at 561–562; *United States* v. *La Franca*, *supra*, 282 U. S., at 572; *Trop* v. *Dulles*, *supra*, 356 U. S., at 96–97; *Flemming* v. *Nestor*, *supra*, 363 U. S., at 615, 617.

[28] *Cummings* v. *Missouri*, *supra*, 4 Wall., at 318; *Helwig* v. *United States*, *supra*, 188 U. S., at 613; *United States* v. *Constantine*, *supra*, 296 U. S., at 295; *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154. But cf. *Child Labor Tax Case*, *supra*, 259 U. S., at 41; *Flemming* v. *Nestor*, *supra*, at 614, 616 and n. 9.

[29] Compare *Cummings* v. *Missouri*, 4 Wall. 277, 320, 322; *United States* v. *Lovett*, 328 U. S. 303, 308–312; Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand. L. Rev. 603, 608 (1951); Note, Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases, 34 Ind. L. J. 231, 249–253 (1959); Comment, The Communist Control Act of 1954, 64 Yale L. J. 712, 723 (1955).

a special category of draft evader.[30] Compare *Trop* v. *Dulles*, *supra*, 356 U. S., at 107–110 (BRENNAN, J., concurring).

### 1. *The Predecessor Statute and Judicial Construction.*

The subsections here in question have their origin in part of a Civil War "Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." Act of March 3, 1865, 13 Stat. 487. Section 21 of that Act, dealing with deserters and draft evaders, was in terms punitive, providing that "in addition to the other lawful penalties of the crime of desertion," persons guilty thereof "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens . . . and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the

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[30] *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, whatever the proposition for which they stand in connection with the power of Congress to impose loss of citizenship, compare *Perez* v. *Brownell*, *supra*, 356 U. S., at 51–52, 61–62 (opinion of the Court), with *id.*, at 68–73 (dissenting opinion of THE CHIEF JUSTICE) and *id.*, at 80 (dissenting opinion of JUSTICE DOUGLAS), are both plainly distinguishable, as is *Perez*. The statutes in question in each of those cases provided loss of citizenship for noncriminal behavior instead of as an additional sanction attaching to behavior already a crime, and congressional expression attending their passage lacked the overwhelming indications of punitive purpose which characterized the enactments here. Thus, basing decision as we do on the unmistakable penal intent underlying the statutes presently at issue, nothing in our holding is inconsistent with these other cases, and there is no occasion for us to pass upon any question of the power of Congress to act as it did in the statutes involved in those cases. See note 43, *infra*.

military or naval service, duly ordered, shall be liable to the penalties of this section." [31]

The debates in Congress in 1865 confirm that the use of punitive language in § 21 was not accidental. The section as originally proposed inflicted loss of rights of citizenship only on deserters. Senator Morrill of Maine proposed amending the section to cover persons who leave the country to avoid the draft, stating, "I do not see why the same principle should not extend to those who leave the country to avoid the draft." Cong. Globe, 38th Cong., 2d Sess. 642 (1865). This "same principle" was punitive, because Senator Morrill was also worried that insofar as the section as originally proposed "provides for a penalty" to be imposed on persons who had theretofore deserted, there was question "whether it is not an *ex post facto* law, whether it is not fixing a penalty for an act already done." *Ibid.* Senator Johnson of Maryland attempted to allay Senator Morrill's concern by explaining that

> "the penalties are not imposed upon those who have deserted, if nothing else occurs, but only on those who have deserted and who shall not return within sixty days. The crime for which the punishment is inflicted is made up of the fact of an antecedent desertion, and a failure to return within sixty days. It is clearly within the power of Congress." *Ibid.*

This explanation satisfied the Senate sufficiently so that they accepted the section, with Senator Morrill's amendment, although Senator Hendricks of Indiana made one last speech in an effort to convince his colleagues of the bill's *ex post facto* nature and, even apart from that, of the excessiveness of the punishment, particularly as applied to draft evaders:

> "It seems to me to be very clear that this section proposes to punish desertions which have already

[31] The acts of Mendoza-Martinez and Cort would have been covered by this statute as well as by §§ 401 (j) and 349 (a)(10).

taken place, with a penalty which the law does not already prescribe. In other words it is an *ex post facto* criminal law which I think we cannot pass. . . . One of the penalties known very well to the criminal laws of the country is the denial of the right of suffrage and the right to hold offices of trust or profit.

"It seems to me this objection to the section is very clear, but I desire to suggest further that this section punishes desertions that may hereafter take place in the same manner, and it is known to Senators that one desertion recently created is not reporting when notified of the draft. . . . I submit to Senators that it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor, from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted. Certainly the punishment for desertion is severe enough. It extends now from the denial of pay up to death; that entire compass is given for the punishment of this offense. Why add this other? It cannot do any good." *Id.*, at 643.

In the House, the motion of New York's Representative Townsend to strike the section as a "despotic measure" which would "have the effect to deprive fifty thousand, and I do not know but one hundred thousand, people of their rights and privileges," was met by the argument of Representative Schenck of Ohio, the Chairman of the Military Committee, that "Here is a penalty that is lawful, wise, proper, and that should be added to the other lawful penalties that now exist against deserters." *Id.*, at 1155. After Representative Wilson of Iowa proposed an amendment, later accepted and placed in the enacted version of the bill, extending the draft-evasion portion to apply to persons leaving "the district in which they are enrolled" in addition to those leaving the country, Representative J. C. Allen of Illinois raised the *ex post facto*

objection to the section as a whole. *Id.*, at 1155–1156. Representative Schenck answered him much as Senator Johnson had replied in the Senate:

> "The gentleman from Illinois [Mr. J. C. ALLEN] misapprehends this section from not having looked carefully, as I think, into its language. He thinks it retroactive. It is not so. It does not provide for punishing those who have deserted in their character of deserters acquired by having gone before the passage of the law, but of those only, who, being deserters, shall not return and report themselves for duty within sixty days. If the gentleman looks at the language of the section, he will find that we have carefully avoided making it retroactive. We give those who have deserted their country and their flag sixty days for repentance and return.
>
> "Mr. J. C. ALLEN. Will not the infliction of this penalty on those who have failed to return to the Army be an additional penalty that did not exist at the time they deserted?
>
> "Mr. SCHENCK. Yes, sir.
>
> "Mr. J. C. ALLEN. Does not that make the law retroactive?
>
> "Mr. SCHENCK. They are deserters now. We take them up in their present status and character as deserters, and punish them for continuing in that character. The gentleman refers to lawyers here. I believe he is a good lawyer himself. Does he not know that if a man steals a horse and runs away with it to the next county it is a continual act of larceny until he delivers up the horse?" *Id.*, at 1156.

The significance of these debates is, as these excerpts plainly show, that while there was a difference in both Houses as to whether the statute would be an *ex post facto* law, there was agreement among all the speakers on both

sides of that issue, as well as on both sides of the merits of the bill generally, that deprivation of rights of citizenship for leaving the country to evade the draft was a "penalty" and "punishment" for a "crime" and an "offense" and a violation of a "criminal law."

A number of state court judicial decisions rendered shortly after the Civil War lend impressive support to the conclusion that the predecessor of §§ 401 (j) and 349 (a)(10), § 21 of the 1865 statute, was a criminal statute imposing an additional punishment for desertion and draft evasion. The first and most important of these was *Huber* v. *Reily,* 53 Pa. 112 (1866), in which, as in most of the cases which followed,[32] the plaintiff had brought an action against the election judge of his home township, alleging that the defendant had refused to receive his ballot on the ground that plaintiff was a deserter and thereby disenfranchised under § 21, and that such refusal was wrongful because § 21 was unconstitutional. The asserted grounds of invalidity were that § 21 was an *ex post facto* law, that it was an attempt by Congress to regulate suffrage in the States and therefore outside Congress' sphere of power, and that it proposed to inflict pains and penalties without a trial and conviction, and was therefore prohibited by the Bill of Rights. In an opinion by Justice Strong, later a member of this Court, the Pennsylvania Supreme Court first characterized the statute in a way which compelled discussion of the asserted grounds of unconstitutionality:

> "The Act of Congress is highly penal. It imposes forfeiture of citizenship and deprivation of the rights of citizenship as penalties for the commission of a crime. Its avowed purpose is to add to the penalties which the law had previously affixed to the offence

[32] See p. 176, *infra.*

> of desertion from the military or naval service of the United States, and it denominates the additional sanctions provided as penalties." 53 Pa., at 114–115.

It then answered the *ex post facto* argument as it had been answered on the floor of Congress, that the offense could as well be in the continued refusal to render service as in the original desertion. The second contention was met with the statement that "The enactment operates upon an individual offender, punishes him for violation of the Federal law by deprivation of his citizenship of the United States, but it leaves each state to determine for itself whether such an individual may be a voter. It does no more than increase the penalties of the law upon the commission of crime." *Id.*, at 116. "The third objection," the court continued, "would be a very grave one if the act does in reality impose pains and penalties before and without a conviction by due process of law." *Id.*, at 116–117. The court then summarized the protections guaranteed by the Fifth and Sixth Amendments, and concluded that it was not consistent with these rights to empower a "judge of elections or a board of election officers constituted under state laws . . . to adjudge the guilt or innocence of an alleged violator of the laws of the United States." *Id.*, at 117. However, the court decided that since the penalty contemplated by § 21 "is added to what the law had previously enacted to be the penalty of desertion, as imprisonment is sometimes added to punishment by fine," it must have been intended "that it should be incurred in the same way, and imposed by the same tribunal that was authorized to impose the other penalties for the offence." *Id.*, at 119. "[T]he forfeiture which it prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by a court-martial, and sentence approved. For the conviction and sentence of such a court there can be no substitute." *Id.*,

at 120. (Emphasis in original.) Accordingly, since the plaintiff had not been so convicted, the court held that he was not disenfranchised.

Subsequent state court decisions in the post-Civil War period followed *Huber* v. *Reily*, both in result and reasoning. *State* v. *Symonds*, 57 Me. 148 (1869); *Severance* v. *Healey*, 50 N. H. 448 (1870); *Gotcheus* v. *Matheson*, 58 Barb. (N. Y.) 152 (1870); *McCafferty* v. *Guyer*, 59 Pa. 109 (1868).

Ultimately and significantly, in *Kurtz* v. *Moffitt*, 115 U. S. 487, a case dealing with the question whether a city police officer had the power to arrest a military deserter, this Court recognized both the nature of the sanction imposed by § 21 and the attendant necessity of procedural safeguards, approvingly citing the above decisions:

> "The provisions of §§ 1996 and 1998, which re-enact the act of March 3, 1865, ch. 79, § 21, 13 Stat. 490, and subject every person deserting the military service of the United States to additional penalties, namely, forfeiture of all rights of citizenship, and disqualification to hold any office of trust or profit, can only take effect upon conviction by a court martial, as was clearly shown by Mr. Justice Strong, when a judge of the Supreme Court of Pennsylvania, in *Huber* v. *Reily*, 53 Penn. St. 112, and has been uniformly held by the civil courts as well as by the military authorities. *State* v. *Symonds*, 57 Maine, 148; *Severance* v. *Healey*, 50 N. H. 448; *Goetcheus* v. *Matthewson*, 61 N. Y. 420; Winthrop's Digest of Judge Advocate General's Opinions, 225." 115 U. S., at 501–502.

Section 21 remained on the books unchanged, except for being distributed in the Revised Statutes as §§ 1996 and 1998, until 1912, when Congress re-enacted it with an amendment making it inapplicable to peacetime violations

and giving the President power to mitigate or remit punishment previously imposed on peacetime violators, Act of August 22, 1912, 37 Stat. 356. The legislative history of that amendment is also instructive for our present inquiry. The discussion in both Houses had reference only to the penalties as operative on deserters, no doubt because there was no peacetime draft to evade, but since the 1865 statute dealt without distinction with both desertion and leaving the jurisdiction to evade, there is no reason to suppose the discussion quoted below to be any less applicable to the latter type of misconduct. The House Committee Report, H. R. Rep. No. 335, 62d Cong., 2d Sess. (1912), which was quoted in its entirety in the Senate Committee Report, S. Rep. No. 910, 62d Cong., 2d Sess. 3–6 (1912), stated that "In addition to the service penalty imposed by the court-martial, the law, as it now stands, imposes the further and most drastic punishment of loss of rights of citizenship . . . . There are in the United States to-day thousands of men who are literally men without a country and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed." H. R. Rep. No. 335, *supra*, at 2. In reporting the bill out of the Committee on Naval Affairs, Representative Roberts of Massachusetts, its author, stated that "the bill now under consideration is intended to remove one of the harshest penalties that can be imposed upon a man for an offense, to wit, the loss of rights of citizenship. . . . [S]uch a drastic penalty was entirely too severe to be imposed upon an American citizen in time of peace." He detailed the penalties meted out by court-martial for desertion, and then referred to the "additional penalty of loss of citizenship," which, he concluded, is "a barbarous punishment." 48 Cong. Rec. 2903 (1912). Senator Bristow of Kansas, a member of his chamber's Committee on Military Affairs,

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also referred in discussing the bill to the forfeiture of rights of citizenship as a "penalty," and said that there is no reason why a peacetime offender should be "punished so severely." 48 Cong. Rec. 9542 (1912).

A somewhat similar amendment had been passed by both Houses of Congress in 1908 but vetoed by the President.[33] The House Committee Report on that occasion, H. R. Rep. No. 1340, 60th Cong., 1st Sess. (1908), consisted mainly of a letter from the Secretary of the Navy to the Congress, and of his annual report. In both documents he referred to loss of citizenship as a "punishment," and as one of the "penalties" for desertion. Representative Roberts spoke in 1908, as he was to do once more in 1912, of the "enormity of the punishment" and the "horrible punishment," and said, "Conviction itself under

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[33] The President's veto message to the Senate, S. Doc. No. 708, 60th Cong., 2d Sess. (1909), indicates that his refusal to approve the measure was premised partly on the fact that it placed the discretion to remit loss of citizenship rights in the Secretary of the Navy and partly on the President's feeling that it "would actually encourage hardened offenders to commit a heinous crime against the flag and the nation." *Id.*, at 2. The former was a fault of the particular form of the measure: The President was worried that power to pardon could not constitutionally be vested in anyone other than himself, and he was further disturbed that placing the power in the Secretary of the Navy would result in discrimination against army people. The President's second reason, however, indicates that to him retention of the law as it stood would serve a purpose always sought to be furthered by the imposition of punishment for crime—deterrence. This is borne out by the statements of the President's advisers in recommending that he veto it. The Secretary of War said, "Loss of citizenship is a substantial part of the punishment, and doubtless has a very considerable effect in deterring desertions." *Id.*, at 3. The Secretary of the Navy stated that "It is believed that the present law regarding the loss of citizenship as a penalty for deserters from the navy acts as a deterrent to many." *Ibid.* The Attorney General indicated his agreement with the Secretary of the Navy. *Id.*, at 5.

the existing law forfeits citizenship. That is the monstrosity of the law." 43 Cong. Rec. 111 (1908). The entire discussion, *id.*, at 110–114, was based on the premise that loss of citizenship is a punishment for desertion, the point at issue, as in 1912, being whether it was too severe a punishment for peacetime imposition. At one point Representative Roberts said, "Loss of citizenship is a punishment," to which Representative Hull of Iowa replied, "Certainly." *Id.*, at 114.

Section 504 of the Nationality Act of 1940, 54 Stat. 1172, repealed the portion of the 1865 statute which dealt with flight from the jurisdiction to avoid the draft. However, in connection with the provision governing loss of citizenship for desertion, which was enacted as § 401 (g) and declared unconstitutional in *Trop* v. *Dulles, supra,* the President's committee of advisers reported that the provisions of the 1865 Act had been "distinctly penal in character," and concluded that "They must, therefore, be construed strictly, and the penalties take effect only upon conviction by a court martial." [34] Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess. 68 (Comm. Print 1939). Section 401 (g) was therefore worded so that loss of nationality could only occur upon conviction for desertion by court-martial. When, however, § 401 (j) was enacted in 1944, no such procedural safeguards were built in. See *Trop* v. *Dulles, supra,* at 93–94. Thus, whereas for JUSTICE BRENNAN concurring in *Trop* the conclusion that expatriation under § 401 (g) was punishment was "but the beginning of critical inquiry," 356 U. S., at 110, a similar conclusion with reference to §§ 401 (j) and 349 (a)(10) is sufficient to sustain the holding that they are unconstitutional.

[34] The advisers' citation of *Huber* v. *Reily, supra,* and *Kurtz* v. *Moffitt, supra,* in support of the quoted statement suggests their awareness that an underlying conviction is constitutionally mandated.

*2. The Present Statutes.*

The immediate legislative history of § 401 (j) confirms the conclusion, based upon study of the earlier legislative and judicial history,[35] that it is punitive in nature. The language of the section was, to begin with, quite obviously patterned on that of its predecessor, an understandable fact since the draft of the bill was submitted to the Congress by Attorney General Biddle along with a letter to Chairman Russell of the Senate Immigration Committee, in which the Attorney General referred for precedent to the 1912 reenactment of the 1865 statute. This letter, which was the impetus for the enactment of the bill, was quoted in full text in support of it in both the House and Senate Committee Reports, H. R. Rep. No. 1229, 78th Cong., 2d Sess. 2–3 (1944); S. Rep. No. 1075, 78th Cong., 2d Sess. 2 (1944), and is set out in the margin.[36] The

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[35] The relevance of such history in analyzing the character of a present enactment is illustrated by the Court's approach in *Helwig* v. *United States,* 188 U. S. 605, 613–619, wherein at considerable length it reviewed and relied upon the character of previous relevant legislation in determining whether the statute before it, which imposed an exaction upon importers who undervalued imported goods for duty purposes, was a penalty.

[36] "My Dear Senator: I invite your attention to the desirability of enacting legislation which would provide (1) for the expatriation of citizens of the United States who in time of war or during a national emergency leave the United States or remain outside thereof for the purpose of evading service in the armed forces of the United States, and (2) for the exclusion from the United States of aliens who leave this country for the above mentioned purpose.

"Under existing law a national of the United States, whether by birth or by naturalization, becomes expatriated by operation of law if he (1) obtains naturalization in a foreign state; (2) takes an oath of allegiance to a foreign country; (3) serves in the armed forces of a foreign state if he thereby acquires the nationality of such foreign state; (4) accepts employment under a foreign state for which only

Senate Report stated that it "fully explains the purpose of the bill." S. Rep. No. 1075, *supra*, at 1. The letter was couched entirely in terms of an argument that citizens who had left the country in order to escape military serv-

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nationals of such state are eligible; (5) votes in a political election in a foreign state or participates in an election or plebiscite to determine the sovereignty over foreign territory; (6) makes a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; (7) deserts from the armed forces of the United States in time of war and is convicted thereof by a court martial; or (8) is convicted of treason (U. S. C., title 8, sec. 801). Machinery is provided whereby a person who is denied any right or privilege of citizenship on the ground that he has become expatriated may secure a judicial determination of his status; and if he is outside of the United States he is entitled to a certificate of identity which permits him to enter and remain in the United States until his status has been determined by the courts (Nationality Act of 1940, sec. 503; U. S. C., title 8, sec. 903).

"The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.

"Accordingly, I recommend the enactment of legislation which would provide (1) for the expatriation of citizens of the United States who in time of war or during a national emergency leave the United States or remain outside thereof for the purpose of evading service in the armed forces of the United States, and (2) for the exclusion from the United States of aliens who leave this country for that purpose. Any person who may be deemed to have become expatriated by operation of the foregoing provision, would be entitled to have his status determined by the courts pursuant to the above-mentioned section of the Nationality Act of 1940.

"Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided

ice should be dealt with, and that loss of citizenship was a proper way to deal with them. There was no reference to the societal good that would be wrought by the legislation, nor to any improvement in soldier morale or in the conduct of war generally that would be gained by the passage of the statute. The House Committee Report and the sponsors of the bill endorsed it on the same basis. The report referred for support to the fact that the FBI files showed "over 800 draft delinquents" in the El Paso area alone who had crossed to Mexico to evade the draft. H. R. Rep. No. 1229, *supra,* at 2. The obvious inference to be drawn from the report, the example it contained, and the lack of mention of any broader purpose is that Congress was concerned solely with inflicting effective retribution upon this class of draft evaders and, no doubt, on others similarly situated. Thus, on the floor of the House, Representative Dickstein of New York, the Chairman of the House Committee on Immigration and Naturalization, explained the bill solely as a means of dealing with "draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war and that they might have to serve in the armed forces . . . ." He implied that the bill was necessary to frustrate their "idea of evading military service and of returning after the war is over, and taking their old places

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for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356). This provision was repealed by section 504 of the Nationality Code of 1940 (54 Stat. 1172; U. S. C., title 8, sec. 904).

"A draft of a proposed bill to effectuate the foregoing purpose is enclosed herewith.

"I have been informed by the Director of the Bureau of the Budget that the proposed legislation is in accord with the program of the President.

"Sincerely yours,

"ATTORNEY GENERAL."

in our society." 90 Cong. Rec. 3261 (1944). Senator Russell, who was manager of the bill as well as Chairman of the Senate Immigration Committee, explained it in similar terms:

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure. . . . Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely impose a similar penalty on those who are not subject to the jurisdiction of our courts, the penalty being the same as would result in the case of those who are subject to the jurisdiction of our courts." 90 Cong. Rec. 7629 (1944).[37]

The Senate and House debates, together with Attorney General Biddle's letter, brought to light no alternative purpose to differentiate the new statute from its predecessor. Indeed, as indicated, the Attorney General's letter specifically relied on the predecessor statute as precedent for this enactment, and both the letter and the debates, consistent with the character of the predecessor statute, referred to reasons for the enactment of the bill which were fundamentally retributive in nature. When all of these considerations are weighed, as they must be, in the context of the incontestibly punitive nature of the predecessor statute, the conclusion that § 401 (j) was itself dominantly punitive becomes inescapable. The legislative history of § 349 (a)(10) of the Immigration and Nationality Act of 1952, which re-enacted § 401 (j), adds

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[37] The Senator's statement that "Any American citizen who is convicted of violating the Selective Service Act loses his citizenship" was apparently a reference to § 401 (g), and should accordingly be read in that limited fashion.

nothing to disturb that result.[38] Our conclusion from the legislative and judicial history is, therefore, that Congress in these sections decreed an additional punishment for the crime of draft avoidance in the special category of cases wherein the evader leaves the country. It cannot do this without providing the safeguards which must attend a criminal prosecution.[39]

## V. Conclusion.

It is argued that our holding today will have the unfortunate result of immunizing the draft evader who has left the United States from having to suffer any sanction against his conduct, since he must return to this country before he can be apprehended and tried for his crime. The compelling answer to this is that the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason. Moreover, the truth is that even without being expatriated, the evader living abroad is not in a position to assert the vast majority of his component rights as an American citizen. If he wishes to assert those rights in any real sense he must return to this country, and by doing that he will subject himself to prosecution. In fact,

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[38] Section 349 (a)(10) did amend § 401 (j) by adding a presumption that failure to comply with any provision of the compulsory service laws of the United States means that the departure from or absence from the United States is for the purpose of avoiding military service. See note 1, *supra*. Our holding today obviates any necessity for passing upon this provision.

[39] *Lipke* v. *Lederer*, 259 U. S. 557; *United States* v. *La Franca*, 282 U. S. 568. See *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348; *Wong Wing* v. *United States*, 163 U. S. 228. Compare *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 554, 556; *Speiser* v. *Randall*, 357 U. S. 513.

while he is outside the country evading prosecution, the United States may, by proper refusal to exercise its largely discretionary power to afford him diplomatic protection,[40] decline to invoke its sovereign power on his behalf. Since the substantial benefits of American citizenship only come into play upon return to face prosecution, the draft evader who wishes to exercise his citizenship rights will inevitably come home and pay his debt, which within constitutional limits Congress has the power to define. This is what Mendoza-Martinez did, what Cort says he is willing to do, and what others have done.[41] Thus our holding today does not frustrate the effective handling of the problem of draft evaders who leave the United States.[42]

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[40] Borchard, Diplomatic Protection of Citizens Abroad (1916), §§ 143, 341; see authorities cited in Klubock, Expatriation—Its Origin and Meaning, 38 Notre Dame Law. 1, 11, n. 68 (1962). See also *Blackmer* v. *United States*, 284 U. S. 421.

[41] The astonishing story of Grover Cleveland Bergdoll is one example. See, *e. g.*, N. Y. Times, Sept. 23, 1927, p. 8, col. 3; May 3, 1935, p. 3, col. 4; Aug. 16, 1935, p. 9, col. 3; Apr. 11, 1939, p. 6, col. 4; May 26, 1939, p. 1, col. 7; May 30, 1939, p. 36, col. 4; Oct. 6, 1939, p. 1, col. 3; Dec. 5, 1939, p. 3, col. 6; 39 Op. Atty. Gen. 303 (1939). Another example is the recent voluntary return of Edward M. Gilbert to face trial on charges for which he could not be extradited. N. Y. Times, Oct 27, 1962, p. 1, col. 1; Oct. 30, 1962, p. 1, col. 2.

[42] Moreover, the problem is, relatively, extremely small. Over 16,000,000 men served in our armed forces during World War II, and nearly 6,000,000 more served during the Korean crisis. The World Almanac (1963), 735. Yet between the time of the enactment of § 401 (j) and June 30, 1961, only about 1,750 persons were denationalized for leaving the country to avoid the draft. Compare figures cited in Klubock, *supra*, at 49, taken from Immigration and Naturalization Service Annual Reports, with figures cited in Comment, The Expatriation Act of 1954, 64 Yale L. J. 1164, 1165, n. 9 (1955), derived partially from correspondence with the General Counsel to the Immigration and Naturalization Service.

We conclude, for the reasons stated, that §§ 401 (j) and 349 (a)(10) are punitive and as such cannot constitutionally stand, lacking as they do the procedural safeguards which the Constitution commands.[43] We recognize that draft evasion, particularly in time of war, is a heinous offense, and should and can be properly punished. Dating back to Magna Carta, however, it has been an abiding principle governing the lives of civilized men that "no freeman shall be taken or imprisoned or disseised or outlawed or exiled . . . without the judgment of his peers or by the law of the land . . . ." [44] What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed "without due process of law." Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend. Therefore the judgments of the District Courts in these cases are

*Affirmed.*

MR. JUSTICE DOUGLAS and MR. JUSTICE BLACK, while joining the opinion of the Court, adhere to the views expressed in the dissent of MR. JUSTICE DOUGLAS, in which MR. JUSTICE BLACK joined, in *Perez* v. *Brownell,* 356 U. S. 44, 79, that Congress has no power to deprive a person of the citizenship granted the native-born by § 1, cl. 1, of the Fourteenth Amendment.

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[43] The conclusion that the denationalization sanction, as used in §§ 401 (j) and 349 (a)(10), is a punishment, obviates any need to determine whether these sections are otherwise within the powers of Congress. That question would have had to be faced only if the foregoing inquiry had disclosed reasons other than punitive for the infliction of loss of nationality in the present context, necessitating decision whether the sections in question were within the powers of Congress as a regulatory scheme, or if the punitive forfeiture of citizenship had been surrounded with appopriate safeguards, obliging decision whether the sections were within the powers of Congress to apply as a criminal sanction.

[44] 14 Encyclopaedia Britannica (1957 ed.) 630.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion because I fully agree with the Court's conclusion that Congress has here attempted to employ expatriation as a penal sanction in respect of behavior deemed inimical to an objective whose pursuit is within its assigned powers, and with the reasoning by which that conclusion is reached. So too, I agree that Congress is constitutionally debarred from so employing the drastic, the truly terrifying remedy of expatriation, certainly where no attempt has been made to apply the full panoply of protective safeguards which the Constitution requires as a condition of imposing penal sanctions. However, I deem it appropriate to elaborate somewhat the considerations which impel me to agree with the Court.

This Court has never granted the existence in Congress of the power to expatriate except where its exercise was intrinsically and peculiarly appropriate to the solution of serious problems inevitably implicating nationality. We have recognized the entanglements which may stem from dual allegiance, and have twice sustained statutes which provided for loss of American citizenship upon the deliberate assumption of a foreign attachment. *Mackenzie* v. *Hare,* 239 U. S. 299; *Savorgnan* v. *United States,* 338 U. S. 491. We have recognized that participation by American nationals in the internal politics of foreign states could dangerously prejudice our diplomacy, and have allowed the use of expatriation as a uniquely potent corrective which precludes recriminations by disowning, at the moment of his provocative act, him who might otherwise be taken as our spokesman or our operative. *Perez* v. *Brownell,* 356 U. S. 44. The instant cases do not require me to resolve some felt doubts of the correctness of *Perez,* which I joined. For the Court has never held that expatriation was to be found in Congress'

arsenal of common sanctions, available for no higher purpose than to curb undesirable conduct, to exact retribution for it, and to stigmatize it.

I.

In *Trop* v. *Dulles*, 356 U. S. 86, we had before us § 401 (g) of the Nationality Act of 1940, which imposed loss of American nationality following conviction of deserting the armed forces in time of war. We held that statute unconstitutional. Three of my Brethren joined in the opinion of THE CHIEF JUSTICE, who analyzed the case in terms equally applicable to the cases at bar. That plurality opinion in *Trop* noted that the congressional power to which expatriation under § 401 (g) was said to be relevant was the "war power." It concluded that expatriation under § 401 (g) could have no value in furtherance of the war power except as a sanction, to deter or punish desertion; that expatriation so employed was "punishment" within the meaning of the Eighth Amendment; and that such punishment was unconstitutional because cruel and unusual.[1]

My concurring views in *Trop*, separately expressed, were akin to those of the plurality. I shared the view that expatriation could have been employed in § 401 (g) only as a sanction, and I considered this an insufficient predicate for its use—which I believed allowable only where some affirmative and unique relationship to policy was apparent. My premise was the simple and fundamental one that legislation so profoundly destructive of individual rights must keep within the limits

[1] The plurality opinion in *Trop* rested alternatively on the proposition that divestiture of citizenship can result only from a clear renunciation or transfer of allegiance on the part of the citizen. However, since this view had been rejected by a majority of the Court in *Perez* v. *Brownell*, *supra*, the *Trop* plurality relied principally on the reasoning outlined in the text.

of palpable reason and rest upon some modicum of discoverable necessity. I was unable to conclude that § 401 (g) met that elementary test. It was evident that recognizable achievement of legitimate congressional purposes through the expatriation device was at best remote; and that far more promising alternative methods existed and had, in fact, been employed.

My Brother STEWART attempts to distinguish *Trop* along two fronts: He argues that expatriation is not here employed as "punishment" in the constitutional sense so that the reasoning of the *Trop* plurality has no application; and he argues that, the question of punishment aside, expatriation as here employed is a uniquely necessary device not falling within the rationale of my views separately expressed in *Trop*.

My Brother STEWART discerns in § 401 (j) [2] an affirmative instrument of policy and not simply a sanction which must be classed as "punishment." The policy objective is thought to be the maintenance of troop morale; a threat to that objective is thought to be the spectacle of persons escaping a military-service obligation by flight; and expatriation of such persons is sustained as a demonstrative counter to that threat. To my mind that would be "punishment" in the purest sense; it would be naked vengeance. Such an exaction of retribution would not lose that quality because it was undertaken to maintain morale. Indeed, it is only the significance of expatriation as retribution which could render it effective to boost morale—the purpose which, to the dissent, removes expatriation as here used from the realm of the punitive. I do not perceive how expatriation so employed would differ analytically from the stocks or the rack. Because

[2] My discussion of § 401 (j) is equally applicable to its re-enactment as § 349 (a) (10) of the Immigration and Nationality Act of 1952, involved in the *Cort* case.

such devices may be calculated to shore up the convictions of the law-abiding by demonstrating that the wicked will not go unscathed, they would not, by the dissent's view, be punitive or, presumably, reachable by the Eighth Amendment.[3] I cannot agree to any such proposition, and I see no escape from the conclusion that § 401 (j), before us today, is identical in purpose to § 401 (g) and is quite as "punitive" as was that statute, which we condemned in *Trop*.

The dissent finds other distinctions between this case and *Trop*, quite apart from its untenable position that § 401 (j) is not punitive. It is said that flight from the country to escape the draft, in contrast with desertion, could never be a mere technical offense equivocal in its implications for the loyalty of the offender. But the unshakable fear of physical stress or harm, the intellectual or moral aversion to combat, and the mental aberration which may result in flight are no more inconsistent with underlying loyalty than was Trop's unauthorized abandonment of his post.[4] Again, it is suggested that the

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[3] The examples I have given must, of course, have some deterrent effect upon the conduct for which they are administered. But this could not, in the dissent's view, render them punitive. For expatriation as employed in § 401 (j) must also, in the dissent's view, have some deterrent effect upon draft-evading flight, since if expatriation were not thought by the dissent to be an undesirable consequence, it could not serve the morale-boosting purpose which is attributed to it. (But see pp. 192–193 and n. 6, *infra*.) And, as the dissent recognizes, the legislative purpose was at least in part a deterrent one.

[4] The "purpose of evading or avoiding training and service" specified in § 401 (j) seems no graver a reflection upon loyalty than the "intent to remain away . . . permanently" or the "intent to avoid hazardous duty or to shirk important service" specified in the definition of desertion codified in the Uniform Code of Military Justice, 10 U. S. C. § 885. The mere fact that the conduct described in § 401 (j) requires the crossing of a frontier does not guarantee that it will be

element of cumulation of punishments which helped expose the futility of expatriation in *Trop* is missing here, because § 401 (j), unlike § 401 (g), becomes operative without a prior conviction, and applies only in the case of flight beyond our borders. But the *Mendoza-Martinez* case, in its collateral estoppel issue, prominently displays what would in any case be obvious—that expatriation under § 401 (j) *is* cumulative with criminal sanctions for draft evasion, for those sanctions apply to fugitives equally as much as to sedentary violators.[5]

Nor can *Trop* rationally be distinguished on the ground that the application of § 401 (j) *only* to fugitives proves that it was designed to fill a void necessarily left by the ordinary criminal draft-evasion sanctions. The point, as I understand it, is that the ordinary sanctions cannot be brought to bear against a fugitive who declines to come home; but he can be expatriated while he remains abroad, without having to be brought before a tribunal and formally proceeded against. The special virtue of expatriation, it appears, is that it may be accomplished *in absentia*.

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any less equivocal or more serious than was Trop's desertion. A resident of Texas might, during time of war, cross the border into Mexico intending to evade the draft, then change his mind and return the next day. Such conduct clearly results in expatriation under § 401 (j).

[5] It is obvious that § 401 (j) does not reach any conduct not otherwise made criminal by the selective service laws. 62 Stat. 622, 50 U. S. C. App. § 462 (a), in relevant part identical with Selective Training and Service Act of 1940, § 11, under which Mendoza-Martinez was prosecuted, provides: "[A]ny person who . . . evades or refuses registration or service in the armed forces or any of the requirements of this title . . . , or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , or rules, regulations, or directions made pursuant to this title . . . , shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

Aside from the denial of procedural due process, which the Court rightly finds in the scheme, the surface appeal of the argument vanishes upon closer scrutiny.

It simply is not true that expatriation provides an instrumentality specially necessary for imposing the congressional will upon fugitive draft evaders. Our statutes now provide severe criminal sanctions for the behavior in question. The fugitive can return only at the cost of suffering these punishments; the only way to avoid them is to remain away. As to any draft delinquent for whom the prospect of this dilemma would not itself pose a recognizable, formidable deterrent, I fail to see how the addition of expatriation could enhance the effect at all.[6] Nor can expatriation affect the fugitive who will not return to be punished—for whom it is thought to be specially designed. For that individual has, *ex hypothesi*, determined on his own to stay away and so cannot be affected by the withdrawal of his right to return. The sting of the measure is felt only by those like Mendoza-Martinez, who have already returned and been punished, and those like Cort, who desire to return and be punished—those, in other words, as to whom expatriation is patently cumulative with other sanctions. As to the unregenerate fugitive whom it is particularly thought to reach, expatriation is but a display of congressional displeasure. I cannot agree that it is within the power of Congress so to express its displeasure with those who will

[6] The prospective fugitive draft evader must consider that if he flees, either (1) he must eventually face criminal fine and imprisonment; or (2) he will not be able to return. To say that prospect (1) will not deter is simply to reject our entire criminal justice as fruitless so far as deterrence is an object. To say that prospect (2) will not deter is simply to concede that expatriation will not deter, either—except on the strained assumption that withdrawal of diplomatic protection can work the difference.

not return as to destroy the rights and the status of those who have demonstrated their underlying attachment to this country by coming home.

It is apparent, then, that today's cases are governed by *Trop* no matter which of the two controlling opinions is consulted. Expatriation is here employed as "punishment," cruel and unusual here if it was there. Nor has expatriation as employed in these cases any more rational or necessary a connection with the war power than it had in *Trop*.

## II.

MR. JUSTICE STEWART's dissent would sustain § 401 (j) as a permissible exercise of the "war power." The appellants in these cases, on the other hand, place their main reliance on the "foreign affairs power." The dissent summarizes the appellants' arguments under this heading but does not purport to pass on them. Because of my conviction that § 401 (j) is unconstitutional no matter what congressional power is invoked in its support, I find it necessary to deal with the foreign affairs arguments advanced by the appellants.

Initially, I note that the legislative history as expounded by the dissent fails to reveal that Congress was mindful of any foreign affairs problem to be corrected by the statute. The primary purpose seems to me to have been retributive, the secondary purpose deterrent; and even the morale-boosting purpose discerned by the dissent has nothing to do with foreign affairs. While the obvious fact that Congress was not consciously pursuing any foreign affairs objective may not necessarily preclude reliance on that power as a ground of constitutionality, it does render such reliance initially questionable.

Proceeding to the appellants' arguments, one encounters first the suggestion that a fugitive draft evader "can easily cause international complications" while he remains

an American citizen, because the United States cannot exercise control over him while he is on foreign soil.

Such a "problem," obviously, exists equally with respect to any fugitive from American justice, and cannot be thought confined to draft evaders. Yet it is only fugitive draft evaders who are expatriated. It is, therefore, impossible to agree that Congress was acting on any such inherently unlikely premise as that expatriation was necessary so as to avoid responsibility for those described by § 401 (j).

But, contend the appellants, § 401 (j) is designed to prevent embroilments as well as embarrassments. During wartime, it is argued, our Government would very likely feel impelled to demand of foreign havens the return of our fugitive draft evaders; and such a demand might seriously offend a "host" country, leading to embroilment. The transparent weakness of this argument—its manifest inconsistency—must be immediately apparent. Surely the United States need not disable itself from making injudicious demands in order to restrain itself from doing so. The argument rests on the possibility that there may be an urgent need to secure a fugitive's return. If that is so, a demand must be made with its attendant risk of embroilment. If expatriating the fugitive makes a demand impossible, it also forever defeats the objective—his return—which would have impelled the demand in the first place. If recapturing fugitives may ever be urgently necessary, it is obvious that automatic expatriation could only be directly opposed to our interest—which requires that the Government be free to choose whether or not to make the demand, in light of all the attendant circumstances.

The appellants have still another argument. It is that whereas the Government is under an obligation to seek the return of the fugitive as long as he remains a citizen, by terminating citizenship "Congress has eliminated at

the outset any further claim that this country would have to the services of these individuals, and has removed all basis for further demands upon them . . . ." This simply is not so. Expatriation may have no effect on a continuing military-service obligation.[7] And it is incontrovertible that the power to punish the initial draft-evasion offense continues although citizenship has meanwhile become forfeit. The Government has so argued in addressing itself to the collateral estoppel issue in *Mendoza-Martinez*. I cannot understand how any obligation to apprehend can be other than coextensive with the power to punish. The Government cannot have it both ways in the same case.

## III.

The appellants urge that, wholly apart from any explicit congressional power, § 401 (j) may be sustained as an exercise of a power inherent in United States sovereignty. My Brethren who would uphold the statute have not adverted to this possibility except, as I shall point out, as they have adopted in passing certain related arguments.

Preliminarily, it is difficult to see what is resolved by the assertion that sovereignty implies a power to expatriate. That proposition may be admitted and yet have no bearing on the problem facing the Court.

For, under our Constitution, only a delimited portion of sovereignty has been assigned to the Government of

[7] As the Government forcefully argues on the collateral estoppel point in *Mendoza-Martinez*, the selective service requirements apply to resident aliens as well as to citizens. Section 401 (j), as discussed in Congress and by the appellants and in MR. JUSTICE STEWART'S dissent in these cases, seems to reflect a special concern with those who flee "for the duration," intending to return after peace is restored. The Government could well argue that such a fugitive, although expatriated, is a resident alien subject to compulsory military service.

which Congress is the legislative arm. To say that there inheres in United States sovereignty the power to sever the tie of citizenship does not answer the inquiry into whether that power has been granted to Congress. Any argument that it has been so delegated which eschews reference to the constitutional text must, it appears, make its appeal to some sense of the inevitable fitness of things. The contentions here fall far short of any such standard.

It is too simple to suggest that it is fitting that Congress be empowered either to extinguish the citizenship of one who refuses to perform the "ultimate duty" of rising to the Government's defense in time of crisis. I pause to note that for this Court to lend any credence whatever to such a criterion—as the dissent would, see pp. 214–215, *infra*—is fraught with the most far-reaching consequences. For if Congress now should declare that a refusal to pay taxes, to do jury duty, to testify, to vote, is no less an abnegation of ultimate duty—or an implied renunciation of allegiance—than a refusal to perform military service, I am unable to perceive how this Court, on the dissent's view, could presume to gainsay such a judgment. But the argument is not saved even by a willingness to accept these consequences. There really is no way to distinguish between the several failures of a citizen's duty I have just enumerated, or to explain why evasion of military service should be visited with this specially harsh consequence, except to recognize that the latter defection is palpably more provocative than the others. But, as I have argued in another context, when conduct is singled out of a class for specially adverse treatment simply because it is specially provocative, there is no escaping the conclusion that punishment is being administered. See *Flemming* v. *Nestor*, 363 U. S. 603, 635–640 (dissenting opinion). Pursuit of the "ultimate duty" concept, then, simply reaffirms my conviction that this case is indistinguishable from *Trop*.

The appellants, however, argue that it is fitting that Congress be empowered to extinguish the citizenship of one who not only refuses to perform his duty, but who also "repudiates his wider obligation as a citizen to submit to this country's jurisdiction and authority" by fleeing the country in order to escape that duty. It is, once again, difficult to see how this flight-repudiation theory can be confined to draft evasion. Every fugitive from United States justice repudiates American authority over him in equal measure. If the difference lies in the quality of the act of draft evasion, then we are back once again to punishment.

The appellants assert that "[a] government which cannot exert force to compel a citizen to perform his *lawful* [Government's emphasis] duty is, to that extent, not sovereign as to him." The apparent corollary is that congressionally imposed expatriation is, under such circumstances, in effect declaratory of a change in status which has already occurred. But the Government is far from conceding its lack of authority over a fugitive draft evader. It informs us that "the federal government has the power to order our citizens abroad to return, for any lawful purpose," citing *Blackmer* v. *United States,* 284 U. S. 421. And, in any event, the argument proves far too much, for it would justify expatriation of any American abroad for any reason who would, equally with persons covered by § 401 (j), be outside our Government's power to compel the performance of duty.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

I agree with and join in Parts I, II, III, and IV of my Brother STEWART's opinion, leading to the conclusion that § 401 (j) of the Nationality Act of 1940, applicable in No. 2 (*Mendoza*), is constitutional. I also agree with his conclusion that, for the same reasons, the substantive

provisions of § 349 (a)(10) of the 1952 Act, applicable in No. 3 (*Cort*), are constitutional. I disagree, however, with his view that the evidentiary presumption contained in § 349 (a)(10) is unconstitutional. I am content to state my reasons in summary form.

1. As I read the opinion below in the *Cort* case I do not think the District Court relied on the § 349 (a)(10) presumption.[1] This view is fortified by several considerations: (i) the constitutionality of the presumption was attacked in Cort's complaint and was briefed by both sides in the District Court; (ii) the text of the presumption itself was set forth in the opinion of the District Court (187 F. Supp., at 684) at only a page or two before the extract quoted in the margin (note 1); and (iii) in these

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[1] The District Court said: "When, as here, a citizenship claimant establishes his birth in the United States the burden is upon the Government to prove by clear, convincing and unequivocal evidence the act it relies upon to show expatriation. Nishikawa v. Dulles, 356 U. S. 129, 133 . . . . We think the Government has met this burden. In 1951 when the plaintiff went abroad it was for a limited period. On December 29, 1952, he accepted a position at the Harvard Medical School to begin the latter part of 1953, and indicated that he had made arrangements for prior transportation to the United States. His intention to return to this country was steadfast until he learned shortly after January 31, 1953, that the school authorities felt that they could not declare him 'essential' for teaching, and that he probably would be drafted. He wrote them on February 10, 1953, that until he heard 'something definite' from the draft board he was 'reluctant to take a decision that may prove to be foolish or premature.' On February 9, June 4, and July 3 in 1953 the draft board sent him notices to report for physical examination, and thereafter ordered him to report for induction on September 14, 1953. The plaintiff made no response or compliance but remained abroad. We are convinced that his purpose was to avoid service in the armed forces.

"The only question left in this case is the constitutionality of the law under which the Government maintains that the plaintiff was divested of his citizenship." 187 F. Supp., at 686.

circumstances it is difficult to believe that the lower court, composed of three experienced judges, either inadvertently ignored the presumption or upheld its validity *sub silentio*. The more likely conclusion is that finding the evidence sufficient without the aid of the presumption, the lower court saw no need for reaching a second constitutional issue.

So viewing the District Court's opinion, I think the evidence was quite sufficient under the "clear, unequivocal, and convincing" standard of *Schneiderman* v. *United States*, 320 U. S. 118, 135, to support the finding below that Cort had remained abroad for the purpose of evading military service.[2]

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[2] Cort was not charged with going abroad in order to avoid military service, but solely with remaining abroad to avoid induction. The evidence shows convincingly that Cort's purpose in remaining abroad, first in England and then in Czechoslovakia, was to avoid the draft.

On May 29, 1951, Cort left the United States to accept a research fellowship at the University of Cambridge, England. A few days before his departure he registered as a "special registrant" under the Doctors Draft Act. On September 11, 1952, he was classified I–A (medical), available for military service. Meanwhile, in late 1951 the Government had requested Cort to surrender his passport for invalidation, except for return to the United States. He did not do this.

On December 29, 1952, Cort accepted, by a letter sent from England, a teaching position at the Harvard Medical School, indicating his intention to return to the United States in late June 1953 in order to start work on August 1, 1953. On the same day he also wrote to the Massachusetts Medical Advisory Committee, stating that he would begin teaching at Harvard in July 1953, and requesting a draft deferment on the ground that this "civilian function . . . shall be far more essential to my country than military service."

On January 29, 1953, Harvard authorities advised the Medical Advisory Committee that they did not regard Cort's teaching position as essential to medical teaching, and on February 4, 1953, the Committee recommended to the local draft board that Cort be considered

2. In addition, I see nothing constitutionally wrong with this presumption either on its face or as related to this case. Similar presumptions have been consistently sustained in criminal statutes, where the standard of proof is certainly no less stringent than in denationalization cases. See, *e. g., Yee Hem* v. *United States,* 268 U. S. 178; *Casey* v. *United States,* 276 U. S. 413; *Hawes* v. *Georgia,* 258 U. S. 1; cf. *Fong Yue Ting* v. *United States,* 149 U. S. 698. As regards the requirement that there must be a "rational connection between the fact proved and the ultimate fact presumed," *Tot* v. *United States,* 319 U. S. 463, 467, this presumption is surely a far cry

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"available for active military service." Between January 31, 1953, and May 29, 1953, the Dean of the Harvard Medical School and Cort exchanged several letters—the Dean suggesting that Cort apply for a commission, Cort expressing surprise that the teaching position was not considered essential, and that until he had heard from his draft board he was "reluctant to take a decision that may prove to be foolish or premature."

On February 9, 1953, Cort was informed by his local draft board that his deferment request had been denied, and he was ordered to report for a physical examination within 30 days of the receipt of the letter. On June 4, 1953, and on July 3, 1953, he was again sent notices directing him to report for a physical examination. On August 13, 1953, Cort was ordered to report for induction on September 14, 1953. Cort did not report notwithstanding that in the interval, as he concedes, he had received these notices from his draft board.

On August 8, 1954, after his residence permit in England was not renewed by the British Home Office, Cort took up residence in Prague, Czechoslovakia, where not until *April 7, 1959,* did he make any application for a United States passport.

Against this background the District Court was certainly entitled to discredit Cort's belated efforts, long after his indictment for draft evasion, to come to terms with the military authorities, as well as his self-serving statements that he remained abroad to avoid investigation as to his alleged Communist affiliations or possible prosecution under the Smith Act.

from that held constitutionally invalid in the *Tot* case.[3] And since we are concerned here only with the presumption as applied in *this* instance (if indeed it was in fact applied below or must now be resorted to in this Court), it is no answer to suggest that in *other* instances application of the presumption might be unconstitutional.

Thus whether or not the § 349 (a)(10) presumption is involved in the *Cort* case, I believe that the order of denationalization there, as well as in the *Mendoza* case, should be upheld.[4]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, dissenting.

The Court's opinion is lengthy, but its thesis is simple: (1) The withdrawal of citizenship which these statutes provide is "punishment." (2) Punishment cannot constitutionally be imposed except after a criminal trial and conviction. (3) The statutes are therefore unconstitu-

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[3] A presumption that one is remaining abroad with a purpose of avoiding military service, arising from continued sojourn abroad in the face of an uncontroverted call to military duty, certainly bears no resemblance whatever to the presumption found wanting in *Tot*. That presumption was that firearms or ammunition possessed by one previously convicted of a crime of violence, or who was a fugitive from justice, were received not only in interstate commerce, but also subsequent to the enactment of the relevant statute, the presumption arising solely from a showing that such person had already once been convicted of a crime of violence and was presently in possession of firearms or ammunition.

[4] Even on the premises of my Brother STEWART, the proper course would be to remand the *Cort* case to the District Court for a new trial, not, as he proposes, to set aside the basic denationalization proceeding. This is not a case of the District Court being called on simply to review for error an administrative record, but one in which it was required to try the denationalization issue *de novo*. In these circumstances there would be no need to have the administrative proceeding start all over again.

tional. As with all syllogisms, the conclusion is inescapable if the premises are correct. But I cannot agree with the Court's major premise—that the divestiture of citizenship which these statutes prescribe is punishment in the constitutional sense of that term.[1]

I.

Despite the broad sweep of some of the language of its opinion, the Court as I understand it does not hold that involuntary deprivation of citizenship is inherently and always a penal sanction—requiring the safeguards of a criminal trial. Such a determination would overrule at least three decisive precedents in this Court.

Nearly 50 years ago the Court held that Congress had constitutional power to denationalize a native-born citizen who married a foreigner but continued to reside here. *Mackenzie* v. *Hare,* 239 U. S. 299. The Court there explicitly rejected the argument "that the citizenship of plaintiff was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right, privilege and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation." 239 U. S., at 308. The power of Congress to denationalize a native-born citizen, without a criminal trial, was reaffirmed in *Savorgnan* v. *United States,* 338 U. S. 491. And less than five years ago, in *Perez* v. *Brownell,* 356 U. S. 44, the Court again upheld this congressional power in an opinion which unambiguously rejected the notion, advanced in

[1] The statute involved in No. 2, *Kennedy* v. *Mendoza-Martinez,* is § 401 (j) of the Nationality Act of 1940, as amended, 58 Stat. 746. The statute involved in No. 3, *Rusk* v. *Cort,* is § 349 (a) (10) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1481 (a) (10). The substantive provisions of these statutes are practically identical. I agree with the Court that the jurisdictional objection and the claims of collateral estoppel in No. 2 are without merit, and that the constitutional validity of both statutes must therefore be determined.

that case by the dissenters,[2] that the *Mackenzie* and *Savorgnan* decisions stand only for the proposition that citizenship may be *voluntarily* relinquished or abandoned either expressly or by conduct. In short, it has been established for almost 50 years that Congress under some circumstances may, without providing for a criminal trial, make expatriation the consequence of the voluntary conduct of a United States citizen, irrespective of the citizen's subjective intention to renounce his nationality, and irrespective too of his awareness that denationalization will be the result of his conduct.[3]

## II.

The position taken by the Court today is simply that, unlike the statutes involved in *Mackenzie, Savorgnan* and *Perez,* the statutes at issue in the present case employ deprivation of citizenship as a penal sanction. In support of this position, the Court devotes many pages of its opinion to a discussion of a quite different law, enacted in 1865, amended in 1912, and repealed in 1940. That law[4] provided for forfeiture of the "rights of citizenship" as an additional penalty for deserters from the armed forces and for enrolled draftees who departed from their district *or* from the United States "to avoid any draft into the military or naval service, duly ordered . . . ." That statute, as the Court correctly says, "was in terms

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[2] 356 U. S., at 62 (dissenting opinion).

[3] In *Perez* v. *Brownell,* the Court pointed out that the provision of the Fourteenth Amendment that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." does not restrict the power of Congress to enact denaturalization legislation. It was there stated that "there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship." 356 U. S., at 58, n. 3.

[4] Act of March 3, 1865, § 21, 13 Stat. 490.

punitive," and I agree with the Court that the statute's legislative history, as well as subsequent judicial decisions construing it, makes it clear that the law *was* punitive—imposing additional punishment upon those convicted of either of the offenses mentioned.[5]

In these cases, however, we have before us statutes which were enacted in 1944 and 1952, respectively. In construing these statutes, I think nothing is to be gained from the legislative history of a quite different law enacted by a quite different Congress in 1865, nor from the reports of still another Congress which amended that law in 1912. Unlike the 1865 law, the legislation at issue in the cases before us is *not* "in terms punitive." And there is nothing in the history of *this* legislation which persuades me that these statutes, though not in terms penal, nonetheless embody a purpose of the Congresses which enacted them to impose criminal punishment without the safeguards of a criminal trial.

Unlike the two sections of the Nationality Act of 1940 which were in issue in *Perez* v. *Brownell*[6] and *Trop* v. *Dulles*,[7] § 401 (j) did not have its genesis in the Cabinet Committee's draft code which President Roosevelt submitted to Congress in 1938.[8] Indeed, § 401 (j) was the product of a totally different environment—the experience of a nation engaged in a global war.

On February 16, 1944, Attorney General Biddle addressed a letter to the Chairman of the Senate Immigra-

[5] This law was the direct predecessor of § 401 (g) of the Nationality Act of 1940, providing the additional penalty of loss of citizenship upon those convicted by court-martial of deserting the armed forces in time of war (a provision subsequently invalidated in *Trop* v. *Dulles*, 356 U. S. 86).

[6] 356 U. S. 44 (involving § 401 (e)).

[7] 356 U. S. 86 (involving § 401 (g)).

[8] See *Perez* v. *Brownell*, 356 U. S., at 52–57; *Trop* v. *Dulles*, 356 U. S., at 94–95; Codification of the Nationality Laws of the United States, H. R. Comm. Print, pt. 1, 76th Cong., 1st Sess. 68–69.

tion Committee, calling attention to circumstances which had arisen after the institution of the draft in World War II, and suggesting the legislation which subsequently became § 401 (j). The Attorney General's letter stated in part:

> "I invite your attention to the desirability of enacting legislation which would provide (1) for the expatriation of citizens of the United States who in time of war or during a national emergency leave the United States or remain outside thereof for the purpose of evading service in the armed forces of the United States and (2) for the exclusion from the United States of aliens who leave this country for the above-mentioned purpose.
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> "Under existing law a national of the United States, whether by birth or by naturalization, becomes expatriated by operation of law if he (1) obtains naturalization in a foreign state; (2) takes an oath of allegiance to a foreign country; (3) serves in the armed forces of a foreign state if he thereby acquires the nationality of such foreign state; (4) accepts employment under a foreign state for which only nationals of such state are eligible; (5) votes in a political election in a foreign state or participates in an election or plebiscite to determine the sovereignty over foreign territory; (6) makes a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; (7) deserts from the armed forces of the United States in time of war and is convicted thereof by a court martial; or (8) is convicted of treason (U. S. C., title 8, sec. 801). Machinery is provided whereby a person who is denied any right or privilege of citizenship on the ground that he has become expatriated may secure a judicial determination of his status; and if he is outside of the United States he is entitled to a

certificate of identity which permits him to enter and remain in the United States until his status has been determined by the courts (Nationality Act of 1940, sec. 503; U. S. C., title 8, sec. 903).

"The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.

"Accordingly, I recommend the enactment of legislation which would provide (1) for the expatriation of citizens of the United States who in time of war or during a national emergency leave the United States or remain outside thereof for the purpose of evading service in the armed forces of the United States and (2) for the exclusion from the United States of aliens who leave this country for that purpose. Any person who may be deemed to have become expatriated by operation of the foregoing provision would be entitled to have his status determined by the courts pursuant to the above-mentioned section of the Nationality Act of 1940." [9]

The bill was passed unanimously by both the House and the Senate, and became Public Law No. 431 of the Seventy-eighth Congress. Neither the committee reports nor the limited debate on the measure in Congress

[9] S. Rep. No. 1075, 78th Cong., 2d Sess. 2.

adds any substantial gloss to the legislative action.[10] And the legislative history of § 349 (a)(10) of the Immigration and Nationality Act of 1952, the statute directly involved in the second of the two cases now before us,

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[10] The House Committee Report does contain some particularization of the problem to which the legislation was addressed: "It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war." H. R. Rep. No. 1229, 78th Cong., 2d Sess. 1–2. In explaining the bill to the House Committee of the Whole, Representative Dickstein, the Chairman of the House Committee on Immigration, stated: "I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war and that they might have to serve in the armed forces, in the naval forces, or the marines, and in an effort to get out of such service. We are all American citizens and our country has a great stake in this war; nevertheless, we have found hundreds of men who have left this country to go to certain parts of Mexico and other South American countries with the idea of evading military service and of returning after the war is over, and taking their old places in our society." 90 Cong. Rec. 3261.

In explaining the bill to the Senate, Senator Russell, the Chairman of the Senate Committee on Immigration, stated: "The . . . bill . . . relates to the class of persons, whether citizens of the United States or aliens, who departed from the United States in order to avoid service in the armed forces of the United States under the Selective Service Act. Information before the committee indicated that on one day several hundred persons departed from the United States through the city of El Paso, Tex., alone, in order to avoid service in either the Army or the Navy of the United States, and to avoid selection under the selective-service law. This bill provides that any person who is a national of the United States, or an American citizen, and who in time of national stress departed from the United States to

gives no additional illumination as to the purpose of the Eighty-second Congress, since the substantive provisions of that statute were but a recodification of § 401 (j) of the 1940 Act.[11]

The question of whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective. See *Cummings* v. *Missouri*, 4 Wall. 277, 320, 322; *United States* v. *Lovett*, 328 U. S. 303, 308–312;

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another country to avoid serving his country, shall be deprived of his nationality.

"It further provides that any alien who is subject to military service under the terms of the Selective Service Act, and who left this country to avoid military service, shall thereafter be forever barred from admission to the United States.

"Mr. President, I do not see how anyone could object to such a bill. An alien who remains in the country and refuses to serve in the armed forces in time of war is prosecuted under our laws, and if found guilty he is compelled to serve a term in the penitentiary. Under the terms of the Selective Service Act an American citizen who refuses to serve when he is called upon to do so is likewise subject to a prison term. Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure. This bill would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely impose a similar penalty on those who are not subject to the jurisdiction of our courts, the penalty being the same as would result in the case of those who are subject to the jurisdiction of our courts." 90 Cong. Rec. 7628–7629.

[11] Section 349 (a)(10) did add a presumption that failure to comply with any provision of the compulsory service laws of the United States means that the departure from or absence from the United States is for the purpose of avoiding military service. See pp. 215–219, *infra*.

*Trop* v. *Dulles,* 356 U. S., at 107–109. See generally, *Flemming* v. *Nestor,* 363 U. S. 603, 613–617; cf. *De Veau* v. *Braisted,* 363 U. S. 144, 160; *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 83–88. In commenting on the nature of this kind of inquiry, the Court said in *Flemming* v. *Nestor,* "We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it." 363 U. S., at 617.

In the light of the standard enunciated in *Nestor,* I can find no clear proof that the prime purpose of this legislation was punitive. To be sure, there is evidence that the deterrent effect of the legislation was considered. Moreover, the attitude of some members of Congress toward those whom the legislation was intended to reach was obviously far from neutral. But the fact that the word "penalty" was used by an individual Senator in the congressional debates is hardly controlling. As THE CHIEF JUSTICE has so wisely remarked, "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" [12]

It seems clear to me that these putative indicia of punitive intent are far overbalanced by the fact that this legislation dealt with a basic problem of wartime morale reaching far beyond concern for any individual affected. The legislation applies only to those who have left this

[12] *Trop* v. *Dulles,* 356 U. S., at 94.

country or remained outside of it for the purpose of avoiding the draft. Congress can reasonably be understood to have been saying that those who flee the country for such express purposes do more than simply disobey the law and avoid the imposition of criminal sanctions. They disassociate themselves entirely from their nation, seeking refuge from their wartime obligations under the aegis of another sovereign. Congress could reasonably have concluded that the existence of such a group, who voluntarily and demonstrably put aside their United States citizenship "for the duration," could have an extremely adverse effect upon the morale and thus the war effort not only of the armed forces, but of the millions enlisted in the defense of their nation on the civilian front. During the consideration of § 401 (j) in Congress there were repeated references to the expectation that fugitive draft evaders then living abroad would return to this country after the war to resume citizenship and to enjoy the fruits of victory. The effect upon wartime morale of the known existence of such a group, while perhaps not precisely measurable in terms of impaired military efficiency, could obviously have been considered substantial. Denationalization of this class of voluntary expatriates was a rational way of dealing with this problem by removing its visible cause. In light of this broader purpose, I cannot find, as the Court does, that § 401 (j) was motivated primarily by the desire to wreak vengeance upon those individuals who fled the country to avoid military service. Rather, the statute seems to me precisely the same kind of regulatory measure, rational and efficacious, which this Court upheld against similar objections in *Perez* v. *Brownell, supra.*[13]

[13] I cannot suppose that the Court today is saying that Congress can impose denationalization without the safeguards of a criminal trial for conduct which is unexceptionable—like marrying an alien—or relatively innocuous—like voting in a foreign election—but that Congress cannot do so for conduct which is reprehensible.

## III.

For the reasons stated, I cannot find in the terms of these statutes or in their legislative history anything close to the "clearest proof" that the basic congressional purpose was to impose punishment. But that alone does not answer the constitutional inquiry in these cases. As with any other exercise of congressional power, a law which imposes deprivation of citizenship, to be constitutionally valid, must bear a rational relationship to an affirmative power possessed by Congress under the Constitution. The appellants submit that in enacting this legislation, Congress could rationally have been drawing on any one of three sources of recognized constitutional power: the implied power to enact legislation for the effective conduct of foreign affairs; the express power to wage war, to raise armies, and to provide for the common defense; and the inherent attributes of sovereignty.

The appellants argue that this legislation, like the statutory provision sustained in *Perez* v. *Brownell, supra,* has a direct relationship to foreign affairs. They point out that international complications could arise if this country attempted to effect the return of citizen draft evaders by requests to a foreign sovereign which that nation might be unwilling to grant. The appellants insist that the possibility of international embroilments resulting from problems caused by fugitive draft evaders is not fanciful, pointing to the background of international incidents preceding the War of 1812, and the long history, later in the nineteenth century, of this country's involvement with other nations over the asserted liability of our naturalized citizens to military obligations imposed by their native countries.[14] Expatriation of those who leave or remain

[14] See III Moore, Digest of International Law (1906), §§ 434, 436–438, 440; Tsiang, The Question of Expatriation in America Prior to 1907 (1942), 44–55, 71–72, 78–84.

away from the United States with draft evasion as their purpose, the appellants say, might reasonably be attributed to a congressional belief that this was the only practical way to nip these potential international problems in the bud. Compare *Perez* v. *Brownell,* 356 U. S., at 60; *Trop* v. *Dulles,* 356 U. S., at 106 (concurring opinion).

In the view I take of this case, it is unnecessary to pursue further an inquiry as to whether the power to regulate foreign affairs could justify denationalization for the conduct in question. For I think it apparent that Congress in enacting the statute was drawing upon another power, broad and far reaching.

A basic purpose of the Constitution was to "provide for the common defence." To that end, the Framers expressly conferred upon Congress a compendium of powers which have come to be called the "war power." [15] Responsive to the scope and magnitude of ultimate national need, the war power is "the power to wage war successfully." See Charles Evans Hughes, War Powers under the Constitution, 42 A. B. A. Rep. 232, 238.

It seems to me evident that Congress was drawing upon this power when it enacted the legislation before us. To be sure, the underlying purpose of this legislation can

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[15] "The Congress shall have Power . . . .

. . . . . .

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces;

. . . . . .

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cls. 11, 12, 13, 14, 18.

hardly be refined to the point of isolating one single, precise objective. The desire to end a potential drain upon this country's military manpower was clearly present in the minds of the legislators and would itself have constituted a purpose having sufficient rational nexus to the exercise of the war power. Indeed, there is no more fundamental aspect of this broad power than the building and maintaining of armed forces sufficient for the common defense. *Selective Draft Law Cases,* 245 U. S. 366; see *Falbo* v. *United States,* 320 U. S. 549. But, in any event, the war power clearly supports the objective of removing a corrosive influence upon the morale of a nation at war. As the Court said in *Hirabayashi* v. *United States,* 320 U. S. 81, 93, the war power "extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war." See *Lichter* v. *United States,* 334 U. S. 742.

This legislation is thus quite different from the statute held invalid in *Trop* v. *Dulles, supra.* In that case there were not five members of the Court who were able to find the "requisite rational relation" between the war power of Congress and § 401 (g) of the 1940 Act imposing denationalization upon wartime deserters from the armed forces. As the concurring opinion pointed out, the statute was "not limited in its effects to those who desert in a foreign country or who flee to another land." 356 U. S., at 107. Indeed, "The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country." 356 U. S., at 92. It was emphasized that conduct far short of disloyalty could technically constitute the military offense

of desertion, 356 U. S., at 112, 113, and that the harshness of denationalization for conduct so potentially equivocal was "an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted power." 356 U. S., at 110.

The legislation now before us, on the other hand, is by its terms completely inapplicable to those guilty of draft evasion who have remained in the United States; it is exclusively aimed at those, whether or not ever criminally convicted, who have gone to or remained in another land to escape the duty of military service. Moreover, the conduct which the legislation reaches could never be equivocal in nature, but is always and clearly a "refusal to perform this ultimate duty of American citizenship." *Trop* v. *Dulles*, 356 U. S., at 112 (concurring opinion).

## IV.

There is one more point to be made as to the substantive provisions of the legislation before us in these cases. Previous decisions have suggested that congressional exercise of the power to expatriate may be subject to a further constitutional restriction—a limitation upon the kind of activity which may be made the basis of denationalization. Withdrawal of citizenship is a drastic measure. Moreover, the power to expatriate endows government with authority to define and to limit the society which it represents and to which it is responsible.

This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country. But I think the legislation at issue in these cases comes so clearly within the compass of those decisions as to make unnecessary in this case an inquiry as to

what the ultimate limitation upon the expatriation power may be.

The conduct to which this legislation applies, involving not only the attribute of flight or absence from this country in time of war or national emergency, but flight or absence for the express purpose of evading the duty of helping to defend this country, amounts to an unequivocal and conspicuous manifestation of nonallegiance, whether considered objectively or subjectively. Ours is a tradition of the citizen soldier. As this Court has said, "[T]he very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." *Selective Draft Law Cases*, 245 U. S. 366, at 378. It is hardly an improvident exercise of constitutional power for Congress to disown those who have disowned this Nation in time of ultimate need.

## V.

For the reasons stated, I believe the substantive provisions of § 401 (j) of the 1940 Act and of § 349 (a)(10) of the 1952 Act are constitutionally valid. In addition to its substantive provisions, however, § 349 (a)(10) declares:

> "For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

I think the evidentiary presumption which the statute creates is clearly invalid, and that it fatally infected the administrative determination that Joseph Henry Cort had lost his citizenship.

The District Court did not mention this statutory presumption, and it is, therefore, impossible to know how much the court relied upon it, if at all. Indeed, the District Court's attention in this case was oriented primarily towards the issue of its jurisdiction and the basic issue of the constitutionality of the substantive provisions of § 349 (a)(10). In view of its holding that § 349 (a)(10) is unconstitutional, the court understandably did not give exhaustive attention to the factual issues presented, devoting but a single short paragraph to the question of whether Cort's conduct had brought him within the statute. 187 F. Supp., at 686.

But it is clear that the final reviewing agency in the State Department relied heavily upon this presumption in determining that Cort had lost his citizenship. The Board of Review on the Loss of Nationality, in its memorandum affirming the initial administrative determination that Cort had lost his citizenship, stated that "[b]y failing to comply with the notices sent to him by his local board, Dr. Cort brought upon himself the presumption mentioned in Section 349 (a)(10), that his continued absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. *Even if the Board should consider that the presumption could be overcome* by showing that a person remained abroad for a purpose other than to avoid the military service, the evidence in Dr. Cort's case, taken as a whole, does not show that he remained abroad for a purpose other than to avoid being drafted." (Emphasis added.) One of the Board's specific findings was "that Dr. Cort has not overcome the presumption raised in the last sentence of Section 349 (a)(10) of the Immigration and Nationality Act."

As was said in *Speiser* v. *Randall*, 357 U. S. 513, at 520–521, "it is commonplace that the outcome of a law-

suit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."

The presumption created by § 349 (a)(10) is wholly at odds with the decisions of the Court which hold that in cases such as this a heavy burden is upon the Government to prove an act of expatriation by clear, convincing, and unequivocal evidence. *Gonzales* v. *Landon,* 350 U. S. 920; *Nishikawa* v. *Dulles,* 356 U. S. 129. This standard commands that "evidentiary ambiguities are not to be resolved against the citizen." *Nishikawa* v. *Dulles,* 356 U. S., at 136.

Without pausing to consider whether this evidentiary standard is a constitutional one, it is clear to me that the statutory presumption here in question is constitutionally invalid because there is insufficient "rational connection between the fact proved and the ultimate fact presumed." *Tot* v. *United States,* 319 U. S. 463, 467. "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment." *Manley* v. *Georgia,* 279 U. S. 1, 6. A federal statute which creates such a presumption is no less violative of Fifth Amendment due process. "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." *Ibid.* It is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be

so unreasonable as to be a purely arbitrary mandate." *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43. Cf. *Speiser* v. *Randall, supra.*

The failure of a person abroad to comply with notices sent by his draft board would obviously be relevant evidence in determining whether that person had gone or remained abroad for the purpose of avoiding military service. But the statute goes much further. It creates a presumption of an expatriating act from failure to comply with "*any* provision of *any* compulsory service laws" by a citizen abroad, regardless of the nature of the violations and regardless of the innocence of his purpose in originally leaving the United States. The various compulsory service laws of the United States contain a multitude of provisions, many of them technical or relatively insignificant. To draw from the violation of a single such provision a presumption of expatriation, with its solemn consequences, is, I think, to engage in irrationality so gross as to be constitutionally impermissible.[16]

It is clear from the record in this case that Cort's sole purpose in leaving the United States in 1951 was to accept a position as a Research Fellow at the University of Cambridge, England. The record also makes clear that in 1946 Cort was called up under the Selective Service law, physically examined, and classified as 4F because of physical disability. The record further shows that Cort voluntarily registered under the Doctors Draft Act, making special arrangements with his draft board to do so in advance of the effective date for registration under the statute, a few days before he left for Europe. Cort filed an affidavit in which he swore that it was his belief,

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[16] *McFarland* v. *American Sugar Rfg. Co.,* 241 U. S. 79, 86; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642; *Morrison* v. *California,* 291 U. S. 82, 90. See *Bailey* v. *Alabama,* 219 U. S. 219, 239; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81.

in the light of his physical disability, that the induction order which he received in England was not issued in good faith to secure his military service, but that its purpose instead was to force him to return to the United States to be investigated by the House Committee on Un-American Activities or prosecuted under the Smith Act. He has made repeated efforts to arrange with Selective Service officials for the fulfillment, albeit belatedly, of his military obligations, if any, and in 1959 his wife came to the United States and met with officials of the Selective Service system for that purpose. The very reason he applied in Prague for a United States passport was, as he swore, so that he could return to the United States in order to respond to the indictment for draft evasion now pending against him in Massachusetts and to fulfill his Selective Service obligations, if any. When Cort applied in Prague for a passport, the American Consul there, who interviewed him, stated his opinion in writing that he had no reason to disbelieve Cort's sworn statement that he had not remained outside the United States to avoid military service.[17] I mention this evidence as disclosed by the present record only to indicate why I think a new administrative hearing freed from the weight of the statutory presumption is in order, not to imply any prejudgment of what I think the ultimate administrative decision should be.

In No. 3, *Rusk* v. *Cort,* I would vacate the judgment of the District Court and remand the case with instructions to declare null and void the certificate of loss of nationality

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[17] The United States Consul said, "Without evidence to the contrary, the consular officer has no reason to doubt Dr. Cort's statements made in the attached affidavit which purports to answer the charge that he departed from and remained outside the jurisdiction of the United States for the purpose of evading or avoiding training and service in the armed forces of the United States."

issued to Cort by the Secretary of State, so that upon Cort's renewed application for a passport, an administrative hearing could be had, free of the evidentiary presumption of § 349 (a)(10). In the event that such administrative proceedings should result in a finding that Cort had lost his United States citizenship, he would be entitled to a *de novo* judicial hearing [18] in which the Government would have the burden of proving an act of expatriation by clear, convincing, and unequivocal evidence. *Gonzales* v. *Landon,* 350 U. S. 920; *Nishikawa* v. *Dulles,* 356 U. S. 129.

In No. 2, *Kennedy* v. *Mendoza-Martinez,* I would reverse the judgment of the District Court.

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[18] *Ng Fung Ho* v. *White,* 259 U. S. 276; *Kessler* v. *Strecker,* 307 U. S. 22, 35; *Frank* v. *Rogers,* 102 U. S. App. D. C. 367, 253 F. 2d 889.

# SIMLER *v.* CONNER.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 59. Argued January 9–10, 1963.—Decided February 18, 1963.

1. In a diversity of citizenship action in a Federal District Court, federal law governs in determining whether the plaintiff is entitled to a jury trial. P. 222.
2. Although the action in this case was in form a declaratory judgment action, it was in basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee contract; it was "legal," not "equitable," in character, and the plaintiff was entitled to a jury trial. P. 223.

295 F. 2d 534, reversed.

*John B. Ogden* argued the cause and filed briefs for petitioner.

*Peyton Ford* argued the cause for respondent. With him on the brief was *Leslie L. Conner,* respondent, *pro se.*

PER CURIAM.

This Court granted certiorari, 368 U. S. 966, to review the decision of the Court of Appeals for the Tenth Circuit, holding that in a diversity action in the Federal District Court, state law, here that of Oklahoma, governs in determining whether an action is "legal" or "equitable" for the purpose of deciding whether a claimant has a right to a jury trial. Applying Oklahoma law, the Court of Appeals decided that a jury trial, although asked for by petitioner, was not here appropriate. 295 F. 2d 534.

In this Court respondent frankly concedes that, contrary to the Court of Appeals holding, federal law governs in determining the right to a jury trial in the federal courts. Respondent seeks to sustain the result reached by the Court of Appeals, however, on the twin grounds

that, applying federal law, no jury was required in this case because (1) the District Court properly granted summary judgment for respondent under Rule 56 of the Federal Rules of Civil Procedure and (2) the present action is "equitable" and not "legal" in character.

We agree with respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. *Parsons* v. *Bedford,* 3 Pet. 433, 446–449; *Scott* v. *Neely,* 140 U. S. 106; *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.,* 356 U. S. 525, 537–539; *Beacon Theatres, Inc.,* v. *Westover,* 359 U. S. 500; *Dairy Queen, Inc.,* v. *Wood,* 369 U. S. 469. Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment* be achieved. In diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law, *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; see *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208; *Palmer* v. *Hoffman,* 318 U. S. 109, but the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law.

However, we do not agree with respondent that in this case a summary judgment was warranted or that this is an "equitable" action not requiring a jury trial.

In two appeals in this case, the Court of Appeals has ruled that in view of conflicting facts presented by affidavits and depositions to the District Court, summary judgment was not warranted. We accept and do not dis-

*"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amend. VII.

turb the ruling of the Court of Appeals on this phase of the case since it has ample support in the record.

On the question whether, as a matter of federal law, the instant action is legal or equitable, we conclude that it is "legal" in character. The record discloses that the controversy between petitioner and respondent in substance involves the amount of fees petitioner, a client, is obligated to pay respondent, his lawyer. Petitioner admits his obligation to pay a "reasonable" fee under a contingent fee retainer contract stipulating that reasonableness may be set in a court trial. Respondent relies on a subsequent contract specifying 50% of the recovery, under certain circumstances, as the amount of the fee. Petitioner counters that the latter contract is the product of fraud and overreaching by the lawyer.

The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally "legal" action. See *Trist* v. *Child,* 21 Wall. 441, 447; *Stanton* v. *Embrey,* 93 U. S. 548. The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved are traditional common-law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested.

Accordingly, the courts below erred in denying petitioner the jury trial guaranteed him by the Seventh Amendment and the judgment is reversed.

*Reversed.*

## SCHNEIDER *v.* RUSK, SECRETARY OF STATE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 251. Decided February 18, 1963.

Petitioner sued in a Federal District Court for an injunction restraining enforcement of § 352 (a)(1) of the Immigration and Nationality Act of 1952, which provides that a naturalized American citizen shall lose his nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . ." A single-judge District Court refused petitioner's request to convene a three-judge court pursuant to 28 U. S. C. § 2282 and dismissed the action. The Court of Appeals affirmed. *Held:* The constitutional question raised by petitioner's complaint was not plainly insubstantial; the single-judge District Court was powerless to dismiss the action on the merits; and a three-judge District Court should have been convened. Pp. 224–225.

Judgment vacated and case remanded to District Court.

*Milton V. Freeman, Robert E. Herzstein, Horst Kurnick* and *Charles A. Reich* for petitioner.

*Solicitor General Cox, Assistant Attorney General Miller, J. William Doolittle, Beatrice Rosenberg* and *J. F. Bishop* for respondent.

*Jack Wasserman, David Carliner* and *Melvin L. Wulf* for the American Civil Liberties Union, as *amicus curiae*.

PER CURIAM.

Trial of this case should have been before a three-judge District Court convened pursuant to 28 U. S. C. §§ 2282, 2284, as petitioner requested. Her complaint explicitly sought an "injunction restraining the enforcement, operation or execution of . . . [an] Act of Congress"—§ 352 (a)(1) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1484 (a)(1), which provides that a natural-

ized American citizen shall lose his nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . ." The District Court concluded that petitioner's complaint presented no substantial constitutional issue and denied petitioner's motion to convene a three-judge court, relying on *Lapides* v. *Clark,* 85 U. S. App. D. C. 101, 176 F. 2d 619 (1949), cert. denied, 338 U. S. 860, in which the Court of Appeals for the District of Columbia Circuit had directly upheld the predecessor of a companion provision, § 352 (a)(2) of the 1952 Act, 8 U. S. C. § 1484 (a)(2), which deprived the naturalized American of his citizenship for residing for five years in any foreign state. The Court of Appeals' *per curiam* affirmance was also based on *Lapides.* Although no view is here intimated as to the merits of the constitutional question in the present case, we disagree with the conclusion of the courts below as to the substantiality of that issue. The intervening decisions of this Court in *Perez* v. *Brownell,* 356 U. S. 44, and *Trop* v. *Dulles,* 356 U. S. 86, reveal that the constitutional questions involving deprivation of nationality which were presented to the district judge were not plainly insubstantial. The single-judge District Court was therefore powerless to dismiss the action on the merits, and should have convened a three-judge court. *Ex parte Northern Pac. R. Co.,* 280 U. S. 142, 144; *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10, 15; *Ex parte Poresky,* 290 U. S. 30; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713. The judgments below are vacated and the case is remanded to the District Court for expeditious action consistent with the views here expressed.

*So ordered.*

692-437 O-63—19

## BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO, ET AL. *v.* CITY AND COUNTY OF DENVER, COLORADO, ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 635. Decided February 18, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 150 Colo. —, 372 P. 2d 152.

*Charles Ginsberg* for appellants.

*Robert S. Wham, Richard P. Matsch, Charles S. Rhyne, Brice W. Rhyne* and *Alfred J. Tighe, Jr.* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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## RUDNICKI *v.* COX ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 706. Decided February 18, 1963.

PER CURIAM.

The appeal is dismissed.

## KING COUNTY ET AL. *v.* F. L. HARTUNG GLASS CO., INC.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 647. Decided February 18, 1963.

Appeal dismissed and certiorari denied.
Reported below: 60 Wash. 2d 392, 374 P. 2d 174.

*William L. Paul, Jr.* for appellants.

*Ofell H. Johnson* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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## CHUPKA ET AL. *v.* LORENZ-SCHNEIDER CO., INC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 650. Decided February 18, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 12 N. Y. 2d 1, 186 N. E. 2d 191.

*Kalman I. Nulman* for appellants.

*Samuel J. Cohen* for appellee Teamsters Local 802.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

## SHELDON ET AL. *v.* FANNIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

No. 656. Decided February 18, 1963.

Appeal dismissed.

Reported below: 214 F. Supp. 940.

*Hayden C. Covington* for appellants.

*Robert W. Pickrell,* Attorney General of Arizona, and *Frank Sagarino,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

## EDWARDS ET AL. *v.* SOUTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 86. Argued December 13, 1962.—Decided February 25, 1963.

Feeling aggrieved by laws of South Carolina which allegedly "prohibited Negro privileges," petitioners, 187 Negro high school and college students, peacefully assembled at the site of the State Government and there peacefully expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina." When told by police officials that they must disperse within 15 minutes on pain of arrest, they failed to do so and sang patriotic and religious songs after one of their leaders had delivered a "religious harangue." There was no violence or threat of violence on their part or on the part of any member of the crowd watching them; but petitioners were arrested and convicted of the common-law crime of breach of the peace, which the State Supreme Court said "is not susceptible of exact definition." *Held:* In arresting, convicting and punishing petitioners under the circumstances disclosed by this record, South Carolina infringed their rights of free speech, free assembly and freedom to petition for a redress of grievances—rights guaranteed by the First Amendment and protected by the Fourteenth Amendment from invasion by the States. Pp. 229–238.

239 S. C. 339, 123 S. E. 2d 247, reversed.

*Jack Greenberg* argued the cause for petitioners. With him on the brief were *Constance Baker Motley, James M. Nabrit III, Matthew J. Perry, Lincoln C. Jenkins, Jr.* and *Donald James Sampson.*

*Daniel McLeod,* Attorney General of South Carolina, argued the cause for respondent. With him on the brief were *J. C. Coleman, Jr.* and *Everett N. Brandon,* Assistant Attorneys General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners, 187 in number, were convicted in a magistrate's court in Columbia, South Carolina, of the

common-law crime of breach of the peace. Their convictions were ultimately affirmed by the South Carolina Supreme Court, 239 S. C. 339, 123 S. E. 2d 247. We granted certiorari, 369 U. S. 870, to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution.

There was no substantial conflict in the trial evidence.[1] Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there, at about noon, they walked in separate groups of about 15 to the South Carolina State House grounds, an area of two city blocks open to the general public. Their purpose was "to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with the present condition of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed."

Already on the State House grounds when the petitioners arrived were 30 or more law enforcement officers, who had advance knowledge that the petitioners were coming.[2] Each group of petitioners entered the grounds through a driveway and parking area known in the record as the "horseshoe." As they entered, they were told by the law enforcement officials that "they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful." Dur-

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[1] The petitioners were tried in groups, at four separate trials. It was stipulated that the appeals be treated as one case.

[2] The Police Chief of Columbia testified that about 15 of his men were present, and that there were, in addition, "some State Highway Patrolmen; there were some South Carolina Law Enforcement officers present and I believe, I'm not positive, I believe there were about three Deputy Sheriffs."

ing the next half hour or 45 minutes, the petitioners, in the same small groups, walked single file or two abreast in an orderly way [3] through the grounds, each group carrying placards bearing such messages as "I am proud to be a Negro" and "Down with segregation."

During this time a crowd of some 200 to 300 onlookers had collected in the horseshoe area and on the adjacent sidewalks. There was no evidence to suggest that these onlookers were anything but curious, and no evidence at all of any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd. The City Manager testified that he recognized some of the onlookers, whom he did not identify, as "possible trouble makers," but his subsequent testimony made clear that nobody among the crowd actually caused or threatened any trouble.[4] There was no obstruction of pedes-

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[3] The Police Chief of Columbia testified as follows:

"Q. Did you, Chief, walk around the State House Building with any of these persons?

"A. I did not. I stayed at the horseshoe. I placed men over the grounds.

"Q. Did any of your men make a report that any of these persons were disorderly in walking around the State House Grounds?

"A. They did not.

"Q. Under normal circumstances your men would report to you when you are at the scene?

"A. They should.

"Q. Is it reasonable to assume then that there was no disorderly conduct on the part of these persons, since you received no report from your officers?

"A. I would take that for granted, yes."

The City Manager testified:

"Q. Were the Negro college students or other students well demeaned? Were they well dressed and were they orderly?

"A. Yes, they were."

[4] "Q. Who were those persons?

"A. I can't tell you who they were. I can tell you they were present in the group. They were recognized as possible trouble makers. [*Footnote 4 continued on p. 232*]

trian or vehicular traffic within the State House grounds.[5] No vehicle was prevented from entering or leaving the horseshoe area. Although vehicular traffic at a nearby street intersection was slowed down somewhat, an officer was dispatched to keep traffic moving. There were a number of bystanders on the public sidewalks adjacent to the State House grounds, but they all moved on when asked to do so, and there was no impediment of pedestrian traffic.[6] Police protection at the scene was at all

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"Q. Did you and your police chief do anything about placing those people under arrest?

"A. No, we had no occasion to place them under arrest.

"Q. Now, sir, you have stated that there were possible trouble makers and your whole testimony has been that, as City Manager, as supervisor of the City Police, your object is to preserve the peace and law and order?

"A. That's right.

"Q. Yet you took no official action against people who were present and possibly might have done some harm to these people?

"A. We took no official action because there was none to be taken. They were not creating a disturbance, those particular people were not at that time doing anything to make trouble but they could have been."

[5] The Police Chief of Columbia testified:

"Q. Each group of students walked along in column of twos?

"A. Sometimes two and I did see some in single-file.

"Q. There was ample room for other persons going in the same direction or the opposite direction to pass on the same sidewalk?

"A. I wouldn't say they were blocking the sidewalk; now, that was through the State House grounds."

[6] The Police Chief of Columbia testified:

"A. At times they blocked the sidewalk and we asked them to move over and they did.

"Q. They obeyed your commands on that?

"A. Yes.

"Q. So that nobody complained that he wanted to use the sidewalk and he could not do it?

"A. I didn't have any complaints on that."

times sufficient to meet any foreseeable possibility of disorder.[7]

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes.[8] Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail.[9]

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[7] The City Manager testified:

"Q. You had ample time, didn't you, to get ample police protection, if you thought such was needed on the State House grounds, didn't you?

"A. Yes, we did.

"Q. So, if there were not ample police protection there, it was the fault of those persons in charge of the Police Department, wasn't it?

"A. There was ample police protection there."

[8] The City Manager testified:

"Q. Mr. McNayr, what action did you take?

"A. I instructed Dave Carter to tell each of these groups, to call them up and tell each of the groups and the group leaders that they must disperse, they must disperse in the manner which I have already described, that I would give them fifteen minutes from the time of my conversation with him to have them dispersed and, if they were not dispersed, I would direct my Chief of Police to place them under arrest."

[9] The City Manager testified:

"Q. You have already testified, Mr. McNayr, I believe, that you did order these students dispersed within fifteen minutes?

"A. Yes.

"Q. Did they disperse in accordance with your order?

"A. They did not. [*Footnote 9 continued on p. 234*]

Upon this evidence the state trial court convicted the petitioners of breach of the peace, and imposed sentences ranging from a $10 fine or five days in jail, to a $100 fine or 30 days in jail. In affirming the judgments, the Supreme Court of South Carolina said that under the law of that State the offense of breach of the peace "is not susceptible of exact definition," but that the "general definition of the offense" is as follows:

> "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . . , it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . .
>
> "By 'peace,' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society." 239 S. C., at 343–344, 123 S. E. 2d, at 249.

The petitioners contend that there was a complete absence of any evidence of the commission of this offense, and that they were thus denied one of the most basic ele-

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"Q. What then occurred?

"A. I then asked Chief of Police Campbell to direct his men to line up the students and march them or place them under arrest and march them to the City Jail and the County Jail.

"Q. They were placed under arrest?

"A. They were placed under arrest."

ments of due process of law. *Thompson* v. *Louisville,* 362 U. S. 199; see *Garner* v. *Louisiana,* 368 U. S. 157; *Taylor* v. *Louisiana,* 370 U. S. 154. Whatever the merits of this contention, we need not pass upon it in the present case. The state courts have held that the petitioners' conduct constituted breach of the peace under state law, and we may accept their decision as binding upon us to that extent. But it nevertheless remains our duty in a case such as this to make an independent examination of the whole record. *Blackburn* v. *Alabama,* 361 U. S. 199, 205, n. 5; *Pennekamp* v. *Florida,* 328 U. S. 331, 335; *Fiske* v. *Kansas,* 274 U. S. 380, 385–386. And it is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.

It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357; *Stromberg* v. *California,* 283 U. S. 359; *De Jonge* v. *Oregon,* 299 U. S. 353; *Cantwell* v. *Connecticut,* 310 U. S. 296. The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. The petitioners felt aggrieved by laws of South Carolina which allegedly "prohibited Negro privileges in this State." They peaceably assembled at the site of the State Government [10] and there peaceably expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina."

[10] It was stipulated at trial "that the State House grounds are occupied by the Executive Branch of the South Carolina government, the Legislative Branch and the Judicial Branch, and that, during the period covered in the warrant in this matter, to wit: March the 2nd, the Legislature of South Carolina was in session."

Not until they were told by police officials that they must disperse on pain of arrest did they do more. Even then, they but sang patriotic and religious songs after one of their leaders had delivered a "religious harangue." There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was "ample."

This, therefore, was a far cry from the situation in *Feiner* v. *New York,* 340 U. S. 315, where two policemen were faced with a crowd which was "pushing, shoving and milling around," *id.,* at 317, where at least one member of the crowd "threatened violence if the police did not act," *id.,* at 317, where "the crowd was pressing closer around petitioner and the officer," *id.,* at 318, and where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot." *Id.,* at 321. And the record is barren of any evidence of "fighting words." See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568.

We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.[11]

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[11] Section 1–417 of the 1952 Code of Laws of South Carolina (Cum. Supp. 1960) provides as follows:

"It shall be unlawful for any person:

"(1) Except State officers and employees and persons having lawful business in the buildings, to use any of the driveways, alleys or parking spaces upon any of the property of the State, bounded by Assembly, Gervais, Bull and Pendleton Streets in *Columbia* upon any regular weekday, Saturdays and holidays excepted, between the hours

See *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308; *Garner* v. *Louisiana*, 368 U. S. 157, 202 (concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more re-

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of 8:30 a. m. and 5:30 p. m., whenever the buildings are open for business; or

"(2) To park any vehicle except in the spaces and manner marked and designated by the State Budget and Control Board, in cooperation with the Highway Department, or to block or impede traffic through the alleys and driveways."

The petitioners were not charged with violating this statute, and the record contains no evidence whatever that any police official had this statute in mind when ordering the petitioners to disperse on pain of arrest, or indeed that a charge under this statute could have been sustained by what occurred.

strictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello* v. *Chicago,* 337 U. S. 1, 4–5. As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." *Id.,* at 5.

As Chief Justice Hughes wrote in *Stromberg* v. *California,* "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. . . ." 283 U. S. 359, 369.

For these reasons we conclude that these criminal convictions cannot stand.

*Reversed.*

MR. JUSTICE CLARK, dissenting.

The convictions of the petitioners, Negro high school and college students, for breach of the peace under South Carolina law are accepted by the Court "as binding upon us to that extent" but are held violative of "petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." Petitioners, of course, had a right to peaceable assembly, to espouse their cause and to petition, but in my view the manner in which they exercised those rights was by no means the passive demonstration which this Court relates; rather, as the City Manager of Columbia

testified, "a dangerous situation was really building up" which South Carolina's courts expressly found had created "an actual interference with traffic and an imminently threatened disturbance of the peace of the community." [1] Since the Court does not attack the state courts' findings and accepts the convictions as "binding" to the extent that the petitioners' conduct constituted a breach of the peace, it is difficult for me to understand its understatement of the facts and reversal of the convictions.

The priceless character of First Amendment freedoms cannot be gainsaid, but it does not follow that they are absolutes immune from necessary state action reasonably designed for the protection of society. See *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940); *Schneider* v. *State,* 308 U. S. 147, 160 (1939). For that reason it is our duty to consider the context in which the arrests here were made. Certainly the city officials would be constitutionally prohibited from refusing petitioners access to the State House grounds merely because they disagreed with their views. See *Niemotko* v. *Maryland,* 340 U. S. 268 (1951). But here South Carolina's courts have found: "There is no indication whatever in this case that the acts of the police officers were taken as a subterfuge or excuse for the suppression of the appellants' views and opinions." [2] It is undisputed that the city officials specifically granted petitioners permission to assemble, imposing only the requirement that they be "peaceful." Petitioners then gathered on the State House grounds, during a General Assembly session, in a large number of almost 200, marching and carrying placards with slogans

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[1] Unreported order of the Richland County Court, July 10, 1961, on appeal from the Magistrate's Court of Columbia, South Carolina. The Supreme Court's affirmance of that order, 239 S. C. 339, 123 S. E. 2d 247, is now before us on writ of certiorari.

[2] *Supra,* note 1.

such as "Down with segregation" and "You may jail our bodies but not our souls." Some of them were singing. The activity continued for approximately 45 minutes, during the busy noon-hour period, while a crowd of some 300 persons congregated in front of the State House and around the area directly in front of its entrance, known as the "horseshoe," which was used for vehicular as well as pedestrian ingress and egress. During this time there were no efforts made by the city officials to hinder the petitioners in their rights of free speech and assembly; rather, the police directed their efforts to the traffic problems resulting from petitioners' activities. It was only after the large crowd had gathered, among which the City Manager and Chief of Police recognized potential troublemakers, and which together with the students had become massed on and around the "horseshoe" so closely that vehicular and pedestrian traffic was materially impeded,[3]

[3] The City Manager testified as follows:

"Q. Now, with relation, Mr. McNayr, to the sidewalks around the horseshoe and the lane for vehicular traffic, how was the crowd distributed, with regard to those sidewalks and roadways?

"A. Well, the conditions varied from time to time, but at numerous times they were blocked almost completely with probably as many as thirty or forty persons, both on the sidewalks and in the street area. . . .

"Q. Did you observe the pedestrian traffic on the walkway?

"A. Yes, I did.

"Q. What was the condition there?

"A. The condition there was that it was extremely difficult for a pedestrian wanting to get through, to get through. Many of them took to the street area, even to get through the street area or the sidewalk."

The Chief of Police testified as follows:

"Q. Was the street blocked?

"A. We had to place a traffic man at the intersection of Gervais and Main to handle traffic and pedestrians.

"Q. Was a vehicular traffic lane blocked?

"A. It was, that was in the horseshoe."

that any action against the petitioners was taken. Then the City Manager, in what both the state intermediate and Supreme Court found to be the utmost good faith, decided that danger to peace and safety was imminent. Even at this juncture no orders were issued by the City Manager for the police to break up the crowd, now about 500 persons, and no arrests were made. Instead, he approached the recognized leader of the petitioners and requested him to tell the various groups of petitioners to disperse within 15 minutes, failing which they would be arrested. Even though the City Manager might have been honestly mistaken as to the imminence of danger, this was certainly a reasonable request by the city's top executive officer in an effort to avoid a public brawl. But the response of petitioners and their leader was defiance rather than cooperation. The leader immediately moved from group to group among the students, delivering a "harangue" which, according to testimony in the record, "aroused [them] to a fever pitch causing this boisterousness, this singing and stomping."

For the next 15 minutes the petitioners sang "I Shall Not Be Moved" and various religious songs, stamped their feet, clapped their hands, and conducted what the South Carolina Supreme Court found to be a "noisy demonstration in defiance of [the dispersal] orders." 239 S. C. 339, 345, 123 S. E. 2d 247, 250. Ultimately, the petitioners were arrested, as they apparently planned from the beginning, and convicted on evidence the sufficiency of which the Court does not challenge. The question thus seems to me whether a State is constitutionally prohibited from enforcing laws to prevent breach of the peace in a situation where city officials in good faith believe, and the record shows, that disorder and violence are imminent, merely because the activities constituting that breach contain claimed elements of constitutionally protected speech

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and assembly. To me the answer under our cases is clearly in the negative.

Beginning, as did the South Carolina courts, with the premise that the petitioners were entitled to assemble and voice their dissatisfaction with segregation, the enlargement of constitutional protection for the conduct here is as fallacious as would be the conclusion that free speech necessarily includes the right to broadcast from a sound truck in the public streets. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). This Court said in *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940), that "[t]he power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted." Significantly, in holding that the petitioner's picketing was constitutionally protected in that case the Court took pains to differentiate it from "picketing *en masse* or otherwise conducted which might occasion . . . imminent and aggravated danger . . . ." *Ibid.* Here the petitioners were permitted without hindrance to exercise their rights of free speech and assembly. Their arrests occurred only after a situation arose in which the law-enforcement officials on the scene considered that a dangerous disturbance was imminent.[4] The County Court found that "[t]he evi-

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[4] The City Manager testified as follows:

"Q. Did you hear any singing, chanting or anything of that nature from the student group?

"A. Yes.

"Q. Describe that as best you can.

"A. With the harangues, which I have just described, witnessed frankly by everyone present and in this area, the students began answering back with shouts. They became boisterous. They stomped their feet. They sang in loud voices to the point where, again, in my judgment, a dangerous situation was really building up."

[*Footnote 4 continued on p. 243*]

dence is clear that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community." [5] In affirming, the South Carolina Supreme Court said the action of the police was "reasonable and motivated solely by a proper concern for the preservation of order and prevention of further interference with traffic upon the public streets and sidewalks." 239 S. C., at 345, 123 S. E. 2d, at 249–250.

In *Cantwell* v. *Connecticut, supra,* at 308, this Court recognized that "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." And in *Feiner* v. *New York,* 340 U. S. 315 (1951), we upheld a conviction for breach of the peace in a situation no more dangerous than that found here. There the demonstration was conducted by only one person and the crowd was limited to approximately 80, as compared with the present lineup of some 200 demonstrators and 300 onlookers. There the petitioner was "endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights." *Id.,* at 317. Only one person—in a city having an entirely differ-

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The Police Chief testified as follows:

"Q. Chief, you were questioned on cross examination at length about the appearance and orderliness of the student group. Were they orderly at all times?

"A. Not at the last.

"Q. Would you describe the activities at the last?

"A. As I have stated, they were singing and, also, when they were getting certain instructions, they were very loud and boisterous."

[5] *Supra,* note 1.

ent historical background—was exhorting adults. Here 200 youthful Negro demonstrators were being aroused to a "fever pitch" before a crowd of some 300 people who undoubtedly were hostile. Perhaps their speech was not so animated but in this setting their actions, their placards reading "You may jail our bodies but not our souls" and their chanting of "I Shall Not Be Moved," accompanied by stamping feet and clapping hands, created a much greater danger of riot and disorder. It is my belief that anyone conversant with the almost spontaneous combustion in some Southern communities in such a situation will agree that the City Manager's action may well have averted a major catastrophe.

The gravity of the danger here surely needs no further explication. The imminence of that danger has been emphasized at every stage of this proceeding, from the complaints charging that the demonstrations "tended directly to immediate violence" to the State Supreme Court's affirmance on the authority of *Feiner, supra.* This record, then, shows no steps backward from a standard of "clear and present danger." But to say that the police may not intervene until the riot has occurred is like keeping out the doctor until the patient dies. I cannot subscribe to such a doctrine. In the words of my Brother Frankfurter:

> "This Court has often emphasized that in the exercise of our authority over state court decisions the Due Process Clause must not be construed in an abstract and doctrinaire way by disregarding local conditions. . . . It is pertinent, therefore, to note that all members of the New York Court accepted the finding that Feiner was stopped not because the listeners or police officers disagreed with his views but because these officers were honestly concerned with preventing a breach of the peace. . . .

"As was said in *Hague* v. *C. I. O., supra,* uncontrolled official suppression of the speaker 'cannot be made a substitute for the duty to maintain order.' 307 U. S. at 516. Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity. Here, there were two police officers present for 20 minutes. They interfered only when they apprehended imminence of violence. It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the [demonstrators]." 340 U. S., at 288–289 (concurring opinion in *Feiner* v. *New York* and other cases decided that day).

I would affirm the convictions.

# NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL. *v.* UNITED STATES ET AL.

ON PETITION FOR REHEARING.

No. 479. Decided February 25, 1963.

1. Petition for rehearing denied.
2. In affirming, 371 U. S. 223, the District Court's judgment dismissing appellants' action to set aside an order of the Interstate Commerce Commission, this Court affirmed the District Court's judgment insofar as it upheld the Commission's order on the merits; but this Court disagreed with the District Court's view that appellants lacked standing to challenge the Commission's order in the District Court.
3. Since appellants, authorized associations of motor carriers under 49 U. S. C. § 5b, are appropriate representatives of their members, and their members would be aggrieved by the Commission's order, appellants had standing to challenge the validity of the Commission's order in the District Court.

Reported below: 205 F. Supp. 592.

*Bryce Rea, Jr.* and *Frederick A. Babson, Jr.* for appellants.

*Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane* and *Fritz R. Kahn* for the United States and the Interstate Commerce Commission.

*D. Robert Thomas, Harry C. Ames, Sr., Giles Morrow, S. Sidney Eisen* and *James L. Givan* for appellee freight forwarders.

PER CURIAM.

The petition for rehearing is denied. However, we think we should make clear the basis upon which our *per curiam* order affirmed the judgment of the District Court.

371 U. S. 223. The District Court dismissed appellants' action to set aside an order of the Interstate Commerce Commission on two grounds: (1) that the appellants lacked standing to challenge the Commission's order in the District Court; (2) that the appellants' challenge to the Commission's order was without merit. Our *per curiam* order affirmed the District Court's judgment insofar as it upheld the validity of the Commission's order on the merits. We disagreed that appellants lacked standing to challenge the Commission's order in the District Court. The appellants are associations of motor carriers, authorized under 49 U. S. C. § 5b, and perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission. Since individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are proper representatives of the interests of their members, appellants have standing to challenge the validity of the Commission's order in the District Court. See Administrative Procedure Act, 5 U. S. C. § 1009 (a); *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459.

MR. JUSTICE HARLAN concurs in the denial of the petition for rehearing and in the affirmance of the judgment of the District Court insofar as that judgment refused to set aside the order of the Interstate Commerce Commission. He believes, however, that the question of "standing" should not be decided without plenary consideration.

MR. JUSTICE STEWART would grant the petition for rehearing.

# HARRISON *v.* MISSOURI PACIFIC RAILROAD CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 690. Decided February 25, 1963.

Petitioner, a section foreman for a railroad, sued the railroad in a state court under the Federal Employers' Liability Act for injuries sustained when he was assaulted by a member of his section gang whom he accused of stealing a ballast fork. A jury awarded damages to petitioner; but the trial judge set aside the verdict and granted the railroad a judgment notwithstanding the verdict. The Appellate Court affirmed. *Held:* The evidence was sufficient to support the jury's finding that the assault was foreseeable; the trial court and the Appellate Court improperly invaded the function and province of the jury; certiorari is granted; the judgment is reversed; and the case is remanded. Pp. 248–250.

Reversed.

*Mark D. Eagleton* for petitioner.

*Ralph D. Walker* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

The petitioner, a section foreman for respondent railroad, was assaulted by one of his section gang whom he accused of stealing a ballast fork. In this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, the petitioner was awarded damages by a jury in the Circuit Court of St. Clair County, Illinois. The trial judge set aside the verdict and granted respondent's motion for judgment notwithstanding the verdict. The Appellate Court affirmed, 35 Ill. App. 2d 66, 181 N. E. 2d 737. Its

judgment became final when the Illinois Supreme Court denied petitioner leave to appeal. Ill. Rev. Stat., 1961, c. 110, § 75.

The trial judge granted respondent's motion on the ground that "there was a lack of evidence to sustain" the jury's verdict. The Appellate Court, in affirming, held that there was no evidence sufficient to support a finding that the respondent knew or should have known prior to the assault of propensities of the assailant to commit such assaults.

We think that the Illinois courts improperly invaded the function and province of the jury in this case. While ". . . reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence," *Gallick* v. *Baltimore & Ohio R. Co., ante,* p. 108, at 117, we have held that the fact that "the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it." *Lillie* v. *Thompson,* 332 U. S. 459, 462. The petitioner's evidence was that his immediate superior, a roadmaster, assigned the assailant to petitioner's crew and at the time warned him: "You will have to watch him because he is a bad actor and a trouble maker. You will have to watch him." He also testified to having several times complained to the roadmaster about the assailant's misconduct and refusal to follow his orders during the two months the assailant was with his crew. Finally, he testified that after the assault the roadmaster said to him: "I told you to look out for him. Now you got yourself in plenty of trouble." This testimony was disputed but, if believed by the jury, it constituted probative facts sufficient to support the jury's finding of foreseeability and withstand the respondent's motion. *McBride* v. *Toledo Terminal R. Co.,*

354 U. S. 517; *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901; see also *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would deny certiorari. See dissenting opinion of Frankfurter, J., and separate opinion of HARLAN, J., in *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 524, 559; concurring opinion of STEWART, J., in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 111; dissenting opinion of HARLAN, J., in *Gallick* v. *Baltimore & Ohio R. Co.*, *ante*, p. 122. The case having been taken, however, they concur in the judgment of the Court. 352 U. S., at 559–562; 361 U. S., at 111.

## WHITE STAG MANUFACTURING CO. *v.* ELLIS ET AL., MEMBERS OF THE STATE TAX COMMISSION OF OREGON.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 708. Decided February 25, 1963.

Appeal dismissed and certiorari denied.
Reported below: 232 Ore. 94, 373 P. 2d 999.

*Walter H. Evans, Jr.* for appellant.

*Robert Y. Thornton,* Attorney General of Oregon, and *Carlisle B. Roberts* and *Gerald F. Bartz,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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## PATTERSON ET AL. *v.* CITY OF DALLAS.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT.

No. 712. Decided February 25, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 355 S. W. 2d 838.

*Robert C. Cox* for appellants.

*H. P. Kucera* and *Ted P. MacMaster* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

## BEARDEN *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 467, Misc. Decided February 25, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 304 F. 2d 532.

*William C. Collins* for petitioner.

*Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Elchuk* v. *United States,* 370 U. S. 722.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

Syllabus.

## WHITE MOTOR CO. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 54. Argued January 14–15, 1963.—Decided March 4, 1963.

The United States brought this civil suit to restrain alleged violations of the Sherman Act by appellant, a manufacturer of trucks, and moved for a summary judgment, contending that appellant's franchise contracts constituted *per se* violations of §§ 1 and 3. Such contracts restricted the geographic areas within which distributors and dealers were permitted to sell trucks and parts, restricted the persons to whom distributors and dealers were permitted to sell trucks for resale, precluded distributors and dealers from selling trucks to any federal or state government or subdivision thereof and other large customers without permission of appellant, fixed the resale price for trucks and parts sold by distributors to dealers for retail sale, and fixed the retail price of parts and accessories sold by distributors and dealers to certain designated customers. Appellant did not file any affidavit denying the Government's allegations; but it did file a brief containing allegations of fact, denying that its agreements were illegal, and contending that it should be allowed to present, at trial, evidence of the reasonableness of its contracts when considered in their own unique business and economic context. The District Court granted summary judgment for the Government. Appellant appealed directly to this Court from all but the price-fixing aspects of the judgment. *Held:* Apart from the price-fixing aspects of the case, summary judgment was improperly granted, and the legality of the territorial and customer limitations of appellant's franchise contracts should be determined only after a trial. Pp. 254–264.

(a) Summary judgments have a place in the antitrust field; but they are not appropriate "where motive and intent play leading roles." *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464. Pp. 259–261.

(b) This is the first case involving a territorial restriction in a *vertical* arrangement; and this Court knows too little of the actual impact of that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before it. Pp. 261–264.

194 F. Supp. 562, reversed.

*Gerhard A. Gesell* argued the cause for appellant. With him on the briefs were *Rufus S. Day, Jr.* and *Nestor S. Foley.*

*Solicitor General Cox* argued the cause for the United States. With him on the brief were *Assistant Attorney General Loevinger* and *Robert B. Hummel.*

Briefs of *amici curiae* were filed by *Sigmund Timberg* for Serta Associates, Inc., et al., and by *John Bodner, Jr.* for the Sandura Company.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil suit under the antitrust laws that was decided below on a motion for summary judgment. Rule 56 of the Rules of Civil Procedure at the time of the hearing below permitted summary judgment to be entered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since that time, an amendment to Rule 56, which is included in proposed changes submitted to Congress pursuant to 28 U. S. C. § 2072, would add the following requirement:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

But no such requirement was present when the present case was decided; and appellant, though strenuously opposing summary judgment and demanding a trial, submitted no such affidavits. It did, however, in its brief in

opposition to the motion for summary judgment, make allegations concerning factual matters which the District Court thought were properly raised and which we think were relevant to a decision on the merits.

Appellant manufactures trucks and sells them (and parts) to distributors,[1] to dealers, and to various large users. Both the distributors and dealers sell trucks (and parts) to users. Moreover, some distributors resell trucks (and parts) to dealers, selected with appellant's consent. All of the dealers sell trucks (and parts) only to users. The principal practices charged as violations of §§ 1 and 3 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 3, concern limitations or restrictions on the territories within which distributors or dealers may sell and limitations or restrictions on the persons or classes of persons to whom they may sell. Typical of the *territorial clause* is the following:

> "Distributor is hereby granted the exclusive right, except as hereinafter provided, to sell during the life of this agreement, in the territory described below, White and Autocar trucks purchased from Company hereunder.
>
> "STATE OF CALIFORNIA: Territory to consist of all of Sonoma County, south of a line starting at the western boundary, or Pacific Coast, passing through the City of Bodega, and extending due east to the east boundary line of Sonoma County, with the exception of the sale of fire truck chassis to the State of California and all political subdivisions thereof.
>
> "Distributor agrees to develop the aforementioned territory to the satisfaction of Company, and not to

[1] We are advised by appellant that since the judgment below, White "no longer uses distributors as a separate tier in its system, but sells directly to dealers instead."

sell any trucks purchased hereunder except in accordance with this agreement, and not to sell such trucks except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in said territory."

Typical of the *customer clause* is the following:

"Distributor further agrees not to sell nor to authorize his dealers to sell such trucks to any Federal or State government or any department or political subdivision thereof, unless the right to do so is specifically granted by Company in writing."

These provisions, applicable to distributors and dealers alike, are claimed by appellee to be *per se* violations of the Sherman Act.[2] The District Court adopted that view and granted summary judgment accordingly. 194 F. Supp. 562. We noted probable jurisdiction. 369 U. S. 858. See 15 U. S. C. § 29.

Appellant, in arguing for a trial of the case on the merits, made the following representations to the District Court: the territorial clauses are necessary in order for appellant to compete with those who make other competitory kinds of trucks; appellant could theoretically have its own retail outlets throughout the country and sell to users directly; that method, however, is not feasible as it entails a costly and extensive sales organization; the only feasible method is the distributor or dealer system; for that system to be effective against the existing competition of the larger companies, a distributor or dealer must make vigorous and intensive efforts in a restricted territory, and if he is to be held responsible for energetic performance, it is fair, reasonable, and necessary that appellant protect him against invasions of his territory by other distributors or dealers of appellant; that appellant in order to obtain

[2] Appellant does not appeal from the District Court's ruling that the provisions of the contracts fixing resale prices were unlawful.

maximum sales in a given area must insist that its distributors and dealers concentrate on trying to take sales away from other competing truck manufacturers rather than from each other. Appellant went on to say:

> "The plain fact is, as we expect to be able to show to the satisfaction of the Court at a trial of this case on the merits, that the outlawing of exclusive distributorships and dealerships in specified territories would reduce competition in the sale of motor trucks and not foster such competition."

As to the customer clauses, appellant represented to the District Court that one of their purposes was to assure appellant "that 'national accounts,' 'fleet accounts' and Federal and State governments and departments and political subdivisions thereof, which are classes of customers with respect to which the defendant is in especially severe competition with the manufacturers of other makes of trucks and which are likely to have a continuing volume of orders to place, shall not be deprived of their appropriate discounts on their purchases of repair parts and accessories from any distributor or dealer, with the result of becoming discontented with The White Motor Company and the treatment they receive with reference to the prices of repair parts and accessories for White trucks."

The agreements fixing prices of parts and accessories to these customers [3] were, according to appellant, only an adjunct to the customer restriction clauses and amounted merely to an agreement to give these classes of customers their proper discounts. "In a way this affects the prices which these classes of customers have to pay for such parts and accessories, but it affects, as a practical matter, only spare and repair parts and accessories and it affects only the discounts to be given to these particular classes of customers. The provisions are necessary if the defendant's

[3] See note 2, *supra*.

future sales to 'National Accounts,' 'Fleet Accounts' and Federal and State governments and departments and political subdivisions thereof, in competition with other truck manufacturers, are not to be seriously jeopardized."

White also argued below:

> "On principle, there is no reason whatsoever why a manufacturer should not have one distributor who is limited to selling to one class of customers and another distributor who is limited to selling to another class of customers or why a distributor should not be limited to one class of customers and the manufacturer reserve the right to sell to another class of customers. There are many circumstances under which there could be no possible objection to limiting the class of customers to which distributors or dealers resell goods, and there are many reasons why it would be reasonable and for the public interest that distributors or dealers should be limited to reselling to certain classes of customers.
>
> "In the instant case, it is both reasonable and necessary that the distributors (except for sales to approved dealers) and direct dealers and dealers be limited to selling to the purchasing public, in order that they may be compelled to develop properly the full potential of sales of White trucks in their respective territories, and to assure The White Motor Company that the persons selling White trucks to the purchasing public shall be fair and honest, to the end of increasing and perpetuating sales of White trucks in competition with other makes of trucks; and it is reasonable and necessary that The White Motor Company reserve to itself the exclusive right to sell White trucks to Federal and State governments or any department or political subdivision thereof rather than to sell such trucks to such governments or

departments or political subdivisions thereof through distributors or dealers, and The White Motor Company should have a perfect right so to do.

"Therefore, based both on the decisions of the Federal Courts and on principle, the limitations on the classes of customers to whom distributors or dealers may sell White trucks are not only not illegal per se, as the plaintiff must prove to succeed on its motion for summary judgment, but these limitations have proper purposes and effects and are fair and reasonable and not violative of the antitrust laws as being in unreasonable restraint of competition or trade and commerce."

In this Court appellant defends the customer clauses on the ground that "the only sure way to make certain that something really important is done right, is to do it for oneself. The size of the orders, the technicalities of bidding and delivery, and other factors all play a part in this decision."

Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473, they are not appropriate "where motive and intent play leading roles." Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial.

Where the sale of an unpatented product is tied to a patented article, that is a *per se* violation since it is a bald effort to enlarge the monopoly of the patent beyond its terms. *Mercoid Corp.* v. *Honeywell Co.,* 320 U. S. 680, 684; *International Salt Co.* v. *United States,* 332 U. S. 392, 395–396. And see *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436. If competitors agree to divide markets, they run afoul of the antitrust laws. *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593. Group boy-

cotts are another example of a *per se* violation. *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457; *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207. Price-fixing arrangements, both vertical (*United States* v. *Parke, Davis & Co.*, 362 U. S. 29; *Dr. Miles Medical Co.* v. *Park & Sons*, 220 U. S. 373) and horizontal (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211), have also been held to be *per se* violations of the antitrust laws; and a trial to show their nature, extent, and degree is no longer necessary.

As already stated, there was price fixing here and that part of the injunction issued by the District Court is not now challenged. In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, where price fixing was "an integral part of the whole distribution system" (*id.*, 720) including customer restrictions. No such finding was made in this case; and whether or not the facts would permit one we do not stop to inquire.

Appellant apparently maintained two types of price-fixing agreements. Under the first, a distributor was allowed to appoint dealers under him, but each distributor had to agree with appellant that he would charge the dealers the same price for trucks that appellant charged its direct dealers. The agreement affected only five percent of the trucks sold by appellant. And there were no price-fixing provisions pertaining to truck sales to ultimate purchasers. The other price-fixing arrangement required all distributors and dealers to give "national accounts," "fleet accounts," and governmental agencies the same discount on parts and accessories as White gave them. No figures are given, but it was assumed by the District Court that the amount of commerce involved under this agreement was relatively small. Without more

detailed findings we therefore cannot say that the case is governed by *United States* v. *Bausch & Lomb Co., supra.*

We are asked to extend the holding in *Timken Roller Bearing Co.* v. *United States, supra* (which banned *horizontal* arrangements among competitors to divide territory), to a *vertical* arrangement by one manufacturer restricting the territory of his distributors or dealers. We intimate no view one way or the other on the legality of such an arrangement, for we believe that the applicable rule of law should be designed after a trial.

This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us.

*Standard Oil Co.* v. *United States,* 221 U. S. 1, 62, read into the Sherman Act the "rule of reason." That "rule of reason" normally requires an ascertainment of the facts peculiar to the particular business. As stated in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention

> will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

We recently reviewed *per se* violations of the antitrust laws in *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1. That category of antitrust violations is made up of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.*, p. 5. Tying arrangements or agreements by a party "to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier" (*id.*, pp. 5–6) may fall in that category, though not necessarily so.

> "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. . . . Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." *Id.*, pp. 6–7.

We recently noted the importance of the nature of the tying arrangement in its factual setting:

> "Thus, unless the tying device is employed by a small company in an attempt to break into a market, cf. *Harley-Davidson Motor Co.*, 50 F. T. C. 1047, 1066, the use of a tying device can rarely be harmonized with the strictures of the antitrust laws, which are intended primarily to preserve and stimulate competition." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330.

Horizontal territorial limitations, like "[g]roup boycotts, or concerted refusals by traders to deal with other traders" (*Klor's* v. *Broadway-Hale Stores, supra,* 212), are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (cf. *Brown Shoe, supra,* at 330; *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 560–561, aff'd, 365 U. S. 567) and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" (*Northern Pac. R. Co.* v. *United States, supra,* p. 5) and therefore should be classified as *per se* violations of the Sherman Act.

There is an analogy from the merger field that leads us to conclude that a trial should be had. A merger that would otherwise offend the antitrust laws because of a

substantial lessening of competition has been given immunity where the acquired company was a failing one. See *International Shoe Co.* v. *Commission,* 280 U. S. 291, 302–303. But in such a case, as in cases involving the question whether a particular merger will tend "substantially to lessen competition" (*Brown Shoe Co.* v. *United States, supra,* pp. 328–329), a trial rather than the use of the summary judgment is normally necessary. *United States* v. *Diebold, Inc.,* 369 U. S. 654.

We conclude that the summary judgment, apart from the price-fixing phase of the case, was improperly employed in this suit. Apart from price fixing, we do not intimate any view on the merits. We only hold that the legality of the territorial and customer limitations should be determined only after a trial.

*Reversed.*

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring.

While I join the opinion of the Court, the novelty of the antitrust questions prompts me to add a few words. I fully agree that it would be premature to declare either the territorial or the customer restrictions illegal *per se,* since "we know too little of the actual impact [of either form of restraint] . . . to reach a conclusion on the bare bones of the . . . evidence before us." But it seems to me that distinct problems are raised by the two types of restrictions and that the District Court will wish to have this distinction in mind at the trial.

I.

I discuss first the territorial limitations. The insulation of a dealer or distributor through territorial restraints against sales by neighboring dealers who would otherwise

be his competitors involves a form of restraint upon alienation, which is therefore historically and inherently suspect under the antitrust laws.[1] See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 404–408. That proposition does not, however, tell us that every form of such restraint is utterly without justification and is therefore to be deemed unlawful *per se*. That is true only of those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5. Specifically, the *per se* rule of prohibition has been applied to price-fixing agreements, group boycotts, tying arrangements, and horizontal divisions of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition.[2] To gauge the appropriateness of a *per se* test for the forms of restraint involved in this case, then, we must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justi-

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[1] For a general consideration of the history and legality of restraints upon alienation, both at common law and under the Sherman Act, see Levi, The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance, Supreme Court Review (Kurland ed. 1960), 258, 270–278.

[2] The general principle which the Court has stated with respect to price-fixing agreements is applicable alike to boycotts, divisions of markets, and tying arrangements: "Whatever economic justification particular . . . agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, n. 59, at 226.

fication would be similarly irrelevant.[3] With respect to the territorial limitations of the type at bar, I agree that the courts have as yet been shown no sufficient experience to warrant such a conclusion.

The Government urges, and the District Court found, that these restrictions so closely resemble two traditionally outlawed forms of restraint—horizontal market division and resale price maintenance—that they ought to be governed by the same absolute legal test. Both analogies are surely instructive, and all the more so because the practices at bar are *sui generis;* but both are, at the same time, misleading. It seems to me that consideration of the similarities has thus far obscured consideration of the equally important differences, which serve in my

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[3] Outside the categories of restraint which are *per se* unlawful, this Court has said that the question to be answered is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

While the Government urges upon us the adoption of a *per se* rule of illegality, it nonetheless recognizes that not all the considerations relevant to the validity of this particular form of restraint are or could be presented by the present case: "What is the importance of *interbrand* as opposed to *intrabrand* competition? . . . Will White's restrictions remain reasonable if its share of the market increases? . . . These are only a few of the issues relevant to a trial of the 'reasonableness' of any particular set of territorial restrictions. Nor could one be content with a single investigation. Business conditions change. The effect of restricting competition among dealers today may be different tomorrow." Brief for the United States, pp. 31–32.

view to distinguish the practice here from others as to which we have held a *per se* test clearly appropriate.

Territorial limitations bear at least a superficial resemblance to horizontal divisions of markets among competitors, which we have held to be tantamount to agreements not to compete, and hence inevitably violative of the Sherman Act,[4] *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593. If it were clear that the territorial restrictions involved in this case had been induced solely or even primarily by appellant's dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement.[5] Cf. *Interstate Circuit, Inc.,* v. *United States,* 306 U. S. 208; *United States* v. *Masonite Corp.,* 316 U. S. 265, 275–276. But for aught that the present record discloses, an equally plausible inference is that the territorial restraints were imposed upon unwilling distributors by the manufacturer to serve exclusively his own interests. That inference gains some credibility from the fact that these limitations—unlike, for example, exclusive franchise agreements—bind the dealers to a rather harsh bargain while leaving the manufacturer unfettered. In any event, neither the source nor the purpose of these restraints can be conclusively determined on the pleadings or the supporting affidavits. The crucial question whether, despite the differences in form, these restraints serve the same pernicious purpose and have the same

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[4] See *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 240–245; *United States* v. *National Lead Co.,* 63 F. Supp. 513, aff'd, 332 U. S. 319. See also Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), 26.

[5] For contrasting views on this question, compare Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 113 (1959), with Robinson, Restraints on Trade and the Orderly Marketing of Goods, 45 Cornell L. Q. 254, 267–268 (1960).

inhibitory effects upon competition as horizontal divisions of markets, is one which cannot be answered without a trial.[6]

The analogy to resale price maintenance agreements is also appealing, but is no less deceptive. Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands. See *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 45–47. While territorial restrictions may indirectly have a similar effect upon *intra*-brand competition, the effect upon *inter*-brand competition is not necessarily the same as that of resale price maintenance.[7]

Indeed, the principal justification which the appellant offers for the use of these limitations is that they foster a vigorous inter-brand competition which might otherwise be absent. Thus, in order to determine the lawfulness of this form of restraint, it becomes necessary to assess the merit of this and other extenuations offered by the appellant. Surely it would be significant to the disposition of

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[6] See, for an elaboration and discussion of some of the factors which might enter such an inquiry, *Snap-On Tools Corp.*, FTC Docket 7116, 3 CCH Trade Reg. Rep. ¶ 15,546; Jordan, Exclusive and Restricted Sales Areas Under the Antitrust Laws, 9 U. C. L. A. L. Rev. 111, 125–129 (1962). For further discussion of the reasons which make such an inquiry desirable with respect to restraints of this very kind, see Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 698–699 (1962).

[7] See Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 800–801 (1962). It may be relevant to the question whether the territorial restrictions were intended to suppress price competition that appellant also maintained a schedule of resale prices in its distributor agreements, though there has been no challenge here to the District Court's finding that those provisions were unlawful *per se*.

this case if, as appellant claims, some such arrangement were a prerequisite for effective competition on the part of independent manufacturers of trucks. Whatever relationship such restraints may bear to the ultimate survival of producers like White should be fully explored by the District Court if we are properly to appraise this excuse for resort to these practices.

There are other situations, not presented directly by this case, in which the possibility of justification cautions against a too hasty conclusion that territorial limitations are invariably unlawful. Arguments have been suggested against that conclusion, for example, in the case of a manufacturer starting out in business or marketing a new and risky product; the suggestion is that such a manufacturer may find it essential, simply in order to acquire and retain outlets, to guarantee his distributors some degree of territorial insulation as well as exclusive franchises. It has also been suggested that it may reasonably appear necessary for a manufacturer to subdivide his sales territory in order to ensure that his product will be adequately advertised, promoted, and serviced.[8] It is, I think, the

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[8] For situations in which such extenuations might be relevant, compare, *e. g.*, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 100 U. S. App. D. C. 161, 243 F. 2d 418; *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. C. D. Md.), aff'd, 239 F. 2d 176 (C. A. 4th Cir.). In the former case the court observed, in holding an exclusive franchise arrangement not violative of the Sherman Act:

"The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it." 100 U. S. App. D. C., at 164, 243 F. 2d, at 421. The doctrine of the *Packard* and *Schwing* cases is, however, of necessarily limited scope; not only were the manufacturers involved much smaller than the "big three" of the automobile industry against whom they competed, but both had

inappropriateness or irrelevance of such justifications as these to the practices traditionally condemned under the *per se* test that principally distinguishes the territorial restraints involved in the present case from horizontal market divisions and resale price maintenance.

Another issue which seems to me particularly to require a full inquiry into the pros and cons of these territorial restrictions is whether, assuming that some justification for these limitations can be shown, their operation is reasonably related to the needs which brought them into being. To put the question another way, the problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests.[9] That question is one which can be adequately treated only by examining the operation and practical effect of the restraints, whatever may be their form. And in order to appraise that effect, it is necessary to know what sanctions are imposed against distributors who "raid," or sell across territorial boundaries in violation of the agreements. If, for example, such a cross-sale incurs only an obligation to share (or "pass over") the profit with the dealer whose territory has been invaded—as is most often, and appar-

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experienced declines in their respective market shares. And the exclusive franchises involved in those cases apparently were not accompanied by territorial limitations. See Jordan, *supra*, note 6, at 135–139. See, for consideration of a similar problem by the Federal Trade Commission, *Columbus Coated Fabrics Corp.*, 55 F. T. C. 1500, 1503–1504.

[9] If the restraint is shown to be excessive for the manufacturer's needs, then its presence invites suspicion either that dealer pressures rather than manufacturer interests brought it about, or that the real purpose of its adoption was to restrict price competition, cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 457–459; *United States* v. *Masonite Corp.*, *supra*. See Turner, *supra*, note 6, at 698–699, 704–705.

ently here, the case [10]—then the practical effect upon competition of a territorial limitation may be no more harmful than that of the typical exclusive franchise—the lawfulness of which the Government does not dispute here. If, on the other hand, the dealer who cross-sells runs the risk under the agreement of losing his franchise altogether, intra-brand competition across territorial boundaries involves serious hazards which might well deter any effort to compete.

Another pertinent inquiry would explore the availability of less restrictive alternatives. In the present case, for example, as the Government suggests, it may appear at the trial that whatever legitimate business needs White advances for territorial limitations could be adequately served, with less damage to competition, through other devices—for example, an exclusive franchise,[11] an assignment of areas of primary responsibility to each distributor,[12] or a revision of the levels of profit pass-over so

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[10] In its complaint, the Government charged that any dealer or distributor who sells in another's reserved territory must pay to the injured distributor "a specified amount of money for violation of said exclusive territory . . . ." There has been no suggestion in this case that more drastic sanctions, such as withdrawal or cancellation of a franchise, have ever been invoked by the appellant to check cross-selling. The pass-over provisions contained in the typical White contract (in a provision governing "adjustment on outside deliveries") seem representative of exclusive-territory sanctions generally employed. See Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 814–816 (1962).

[11] The District Court suggested, 194 F. Supp., at 585–586, and the Government seems to concede, that certain types of exclusive franchises would not violate the Sherman Act, although a determination of the legality of such arrangements would seem also to require an examination of their operation and effect.

[12] See *Snap-On Tools Corp.*, FTC Docket No. 7116, 3 CCH Trade Reg. Rep. ¶ 15,546, p. 20,414. A number of consent decrees have recently recognized the lawfulness of area-of-primary-responsibility covenants as substitutes for the more restrictive exclusive arrange-

as to minimize the deterrence to cross-selling by neighboring dealers where competition is feasible.[13] But no such inquiry as this into the question of alternatives could meaningfully be undertaken until the District Court has ascertained the effect upon competition of the particular territorial restraints in suit, and of the particular sanctions by which they are enforced.

## II.

I turn next to the customer restrictions. These present a problem quite distinct from that of the territorial limitations. The customer restraints would seem inherently the more dangerous of the two, for they serve to suppress all competition between manufacturer and distributors for the custom of the most desirable accounts. At the same time they seem to lack any of the countervailing tendencies to foster competition between brands which may accompany the territorial limitations. In short, there is far more difficulty in supposing that such customer restrictions can be justified.

The crucial question to me is whether, in any meaningful sense, the distributors could, but for the restrictions,

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ments. See, *e. g.*, *United States* v. *Bostitch, Inc.*, CCH 1958 Trade Cases ¶ 69,207 (D. C. D. R. I.); *United States* v. *Rudolph Wurlitzer Co.*, CCH 1958 Trade Cases ¶ 69,011 (D. C. W. D. N. Y.). The thrust of such provisions is, however, only that the dealer must adequately represent the manufacturer in the assigned area, not that he must stay out of other areas. See generally 60 Mich. L. Rev. 1008 (1962).

[13] The essential question whether such restraints exceed the appellant's competitive needs cannot be answered, as the Government suggests, simply by reference to the views of major automobile manufacturers that territorial limitations are unnecessary to ensure effective promotion and servicing for their products. See Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Automobile Marketing Legislation, 84th Cong., pp. 160, 248, 285, 323.

compete with the manufacturer for the reserved outlets.[14] If they could, but are prevented from doing so only by the restrictions, then in the absence of some justification neither presented nor suggested by this record, their invalidity would seem to be apparent. Cf. *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 312; *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32. If, on the other hand, it turns out that as a practical matter the restricted dealers could neither fill the orders nor service the fleets of the governmental and fleet customers, then the District Court might conclude that because there would otherwise be no meaningful competition, the restrictive agreements do no more than codify the economically obvious. It might even be that such restrictions were originally designed to foreclose the distributors from soliciting the reserved accounts, but that now the restrictions have become meaningless because the distributors would in any event be unable to compete.

The reasons given by White for the use of customer restrictions strike me as untenable if in operation and effect the restrictions are found to stifle competition. These justifications are of three types. First, White argues that such restrictions are required because "[a] distributor or dealer is not competent to handle this intricate process [of servicing large accounts] until he has had

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[14] In an analogous case, brought under § 5 of the Federal Trade Commission Act, the Commission dismissed the complaint because of insufficient evidence that customer limitations had foreclosed meaningful competition. *In the Matter of Roux Distributing Co.*, 55 F. T. C. 1386. The finding that non-contractual customer restrictions had a clearly anticompetitive effect in *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, was one which could seemingly not have been made without a trial on the merits, even though the manufacturer involved held a position of virtual monopoly. See Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 817–818 (1962).

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many months of specialized White training"; and that there is a consequent danger of "unauthorized dealers" who "will be unqualified to work out specifications for trucks to meet customers' peculiar requirements." To the extent that these fears are well founded, they represent the concerns which any manufacturer may legitimately have about his distributors' ability to deal effectively with large or demanding customers. By their very terms, however, these concerns seem to call not for cutting the distributors completely out of this segment of the market, but rather for such less drastic measures as, for example, improved supervision and training, or perhaps a special form of manufacturer's warranty to the governmental and fleet purchasers to protect against unsatisfactory distributor servicing.

The second justification White offers is that "the only sure way to make certain that something really important is done right, is to do it for oneself." This argument seems to me to prove too much, for if the distributors truly cannot be counted on to solicit and service the governmental and fleet accounts—not all of which are, in fact, large or demanding—then this suggests that the only adequate solution may be vertical integration, the elimination of all independent or franchised distribution. But that White is either unwilling or unable to do. Instead, it seeks the best of both worlds—to retain a distribution system for the general run of its customers, while skimming off the cream of the trade for its own direct sales. That, it seems to me, the antitrust laws would not permit, cf. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 375, if in fact the distributors could compete for the reserved accounts without the restrictions.

The third justification, which White offered in its jurisdictional statement, is that customer limitations are essential to enable it to "more effectively compete against its competitors by selling trucks directly" to the reserved

customers rather than "through the interposition of distributors or dealers." This argument invites consideration of what to me is the essential vice of the customer restrictions. The manufacturer's very position in the channels of distribution should afford him an inherent cost advantage over his distributors. In the nature of things, it would seem that the large purchasers would buy from whichever outlet gave them the lowest prices. Thus, if the manufacturer always did grant discounts which the distributors were unable to grant, there would seem to be no reason whatever for denying the distributors able to overcome that advantage access to the preferred customers. Conversely, the presence of such restrictions in the agreements between White and its distributors suggests that they are designed, at least in part, to protect a noncompetitive pricing structure, in which the manufacturer in fact does *not* always charge the lowest prices.

In sum, the proffered justifications do not seem to me to sanction customer restrictions which suppress all competition between the manufacturer and his distributors for the most desirable customers. On trial, as I see it, the Government will necessarily prevail unless the proof warrants a finding that, even in the absence of the restrictions, the economics of the trade are such that the distributors cannot compete for the reserved accounts.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

The Court is reluctant to declare vertical territorial arrangements illegal *per se* because "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact . . . of that restriction . . . to reach a conclusion on the bare bones of the documentary evidence before us." The "bare bones" consist of the complaint and answer, excerpts from interrogatories, exhibits and deposition of the secretary

of White Motor on behalf of the Government, taken in 1959, the formal motion of the Government for summary judgment and an excerpt entitled "Argument" from the brief of White Motor in opposition thereto. I believe that these "bare bones" really lay bare one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century.

This "argument," which the appellant has convinced the Court raises a factual issue requiring a trial, points out that each distributor is required to maintain a sales room, service station and a representative number of White trucks. "In return for these agreements of the distributor . . . it is only fair and reasonable and, in fact, necessary . . . that the distributor shall be protected in said distributor's territory against selling therein by defendant's other distributors . . . who have not made the investment of money and effort . . . in the said territory." Likewise, appellant's argument continues, "similar provisions in direct dealers' contracts and in contracts between the distributors and their respective dealers have the same purposes and the same effects." These limitations have "the purpose and effect of promoting the business and increasing the sales of White trucks in competition with The White Motor Company's powerful competitors." Emphasizing that the motor-truck manufacturing industry is one of "the most highly competitive industries in this country," appellant points up that its share "is very small" and "by no stretch of the imagination, could be said to dominate the market in trucks." It insists that there are but two ways to market trucks: (1) selling to the public through its own sales and service stations, and (2) through the distributor-dealer distribution system which it presently follows. It discards the first as being "feasible only for a very large company." As to the second, the distributors and dealers must not be allowed to spread their efforts "too thinly over more territory

than they can vigorously and intensively work." It is therefore necessary, appellant says, "to confine their efforts to a territory no larger than they have the financial means and sales and service facilities and capabilities to intensively cultivate . . . ." In return "it is only fair and reasonable, and indeed necessary, that The White Motor Company protect its dealers and distributors in their respective allotted territories against the exploitation by other White distributors or dealers, and indeed by the Company itself . . . ." In order to procure "distributors and dealers that will adequately represent The White Motor Company's line of motor trucks, [it] has to agree that these men shall be exclusive sales representatives in a given territory." For this reason appellant "will not allow any other of its distributors or dealers to come into the territory and scalp the market for White trucks therein." Rather than "cutting each other's throats" White Motor insists that they "concentrate on trying to take sales away from other competing truck manufacturers . . . ." The net effect of its justification for the territorial allocation is that "these limitations have proper purposes and effects and are fair and reasonable . . . ." (Italicized in original.)

On the price-fixing requirement in the contracts, which White Motor has abandoned on appeal, the "argument" points out that this requirement was limited to about 5% of its sales and was not followed in sales to the public. Justification for its use otherwise was that it insured that all of its agents "get an equal break pricewise," which was a necessary step to having "satisfied and efficient dealer organizations." As to the required discounts provision on repair parts and accessories, it says that these are necessary "if the defendant's future sales to 'National Accounts,' 'Fleet Accounts' and Federal and State governments . . . and political subdivisions . . . are not to be seriously jeopardized." After all, it says, "probably

nothing will make the owner of a motor vehicle so peeved as to be overcharged for repair parts and accessories."

The situation in which White Motor finds itself may be summed up in its own words, *i. e.*, that its contracts are "the only feasible way for [it] to compete effectively with its bigger and more powerful competitors . . . ." In this justification it attempts but to make a virtue of business necessity, which has long been rejected as a defense in such cases. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407–408 (1911); *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 467–468 (1941), and *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). This is true because the purpose of these provisions in its contracts as shown by White Motor's own "argument" is to enable it to compete with its "powerful competitors" and "protect its dealers and distributors in their respective allotted territories against the exploitation by other White distributors or dealers" and thus prevent them from "cutting each other's throats." These grounds for its action may be good for White Motor but they are disastrous for free competitive enterprise and, if permitted, will destroy the effectiveness of the Sherman Act. For under these contracts a person wishing to buy a White truck must deal with only one seller who by virtue of his agreements with dealer competitors has the sole power as to the public to set prices, determine terms and even to refuse to sell to a particular customer. In the latter event the customer could not buy a White truck because a neighboring dealer must reject him under the White Motor contract unless he has "a place of business and/or purchasing headquarters" in the latter's territory. He might buy another brand of truck, it is true, but the existence of interbrand competition has never been a justification for an explicit agreement to eliminate competition. See *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). Like-

wise each White Motor dealer is isolated from all competition with other White Motor dealers. One cannot make a sale or purchase of a White Motor truck outside of his own territory. He is confined to his own economic island.

I have diligently searched appellant's offer of proof but fail to find any allegation by it that raises an issue of fact. All of its statements are economic arguments or business necessities none of which have any bearing on the legal issue. It clearly appears from its contracts that "all room for competition between retailers [dealers], who supply the public, is made impossible." *John D. Park & Sons Co.* v. *Hartman,* 153 F. 24, 42 (C. A. 6th Cir.), opinion by Mr. Justice Lurton, then circuit judge, and adopted by Mr. Justice Hughes, later Chief Justice, in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co., supra,* at 400 (1911). I have read and re-read appellant's "argument" and even though I give it the dignity of proof I return to the conclusion, as did Mr. Justice Lurton, that "If these contracts leave any room at any point of the line for the usual play of competition between the dealers . . . it is not discoverable." *Ibid.*

This Court, it is true, has never held whether there is a difference between market divisions voluntarily undertaken by a manufacturer such as White Motor and those of dealers in a commodity, agreed upon by themselves, such as were condemned in *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951). White does not contend that its distribution system has any less tendency to restrain competition among its distributors and dealers than a horizontal agreement among such distributors and dealers themselves. It seems to place some halo around its agreements because they are vertical. But the intended and actual effect is the same as, if not even more destructive than, a price-fixing agreement or any of its *per se* counterparts. This is true because price-fixing

agreements, being more easily breached, must be continually policed by those forming the combination, while contracts for a division of territory, being easily detected, are practically self-enforcing. Moreover, White Motor has admitted that each of its distributors and dealers, numbering some 300, has entered into identical contracts. In its "argument" it says that "it has to" agree to these exclusive territorial arrangements in order to get financially able and capable distributors and dealers. It has nowise denied that it has been required by the distributors or dealers to enter into the contracts. Indeed the clear inference is to the contrary. The motivations of White Motor and its distributors and dealers are inextricably intertwined; the distributors and dealers are each acquainted with the contracts and have readily complied with their requirements, without which the contracts would be of no effect. It is hard for me to draw a distinction on the basis of who initiates such a plan. Indeed, under *Interstate Circuit, Inc.*, v. *United States*, 306 U. S. 208, 223 (1939), the unanimity of action by some 300 parties here forms the basis of an "understanding that all were to join" and the economics of the situation would certainly require as much. There this Court on a much weaker factual basis held:

> "It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such . . . methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance."

Likewise, the other restrictions in the contracts run counter to the Sherman Act. This Court has held the restriction on the withholding of customers to be illegal as a contract between potential competitors not to compete, *United States* v. *McKesson & Robbins, Inc., supra,* at

312 (1956), and White Motor's prohibition on resales without its approval is condemned by *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721 (1944). Experience, as well as our cases, has shown that these restrictions have a "pernicious effect on competition and lack . . . any redeeming virtue . . . ." *Northern Pac. R. Co.* v. *United States, supra,* at 5.

The Court says that perhaps the reasonableness or the effect of such arrangements might be subject to inquiry. But the rule of reason is inapplicable to agreements made solely for the purpose of eliminating competition. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) (price fixing); *Fashion Originators' Guild* v. *Federal Trade Comm'n, supra* (group boycotts); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), and *United States* v. *National Lead Co.*, 332 U. S. 319 (1947) (tying arrangements); *Timken Roller Bearing Co.* v. *United States, supra; Nationwide Trailer Rental System* v. *United States,* 355 U. S. 10 (1957), affirming 156 F. Supp. 800 (D. C. D. Kan. 1957), and *United States* v. *National Lead Co., supra* (division of markets). The same rule applies to the contracts here. The offered justification must fail because it involves a contention contrary to the public policy of the Sherman Act, which is that the suppression of competition is in and of itself a public injury. To admit, as does the petitioner, that competition is eliminated under its contracts is, under our cases, to admit a violation of the Sherman Act. No justification, no matter how beneficial, can save it from that interdiction.

The thrust of appellant's contention seems to be in essence that it cannot market its trucks profitably without the advantage of the restrictive covenants. I note that other motor car manufacturers—including the "big three"—abandoned the practice over a decade ago. One of these, American Motors, told the Eighty-fourth Congress, before which legislation was pending to permit divi-

sion of territory,[1] that it was "not in favor of any legislation, permissive or otherwise, that restricts the right of the customer to choose any dealers from whom he desires to purchase." Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Automobile Marketing Legislation, 84th Cong., p. 285. American Motors seems to have been able to survive and prosper against "big three" competition. But even though White Motor gains an advantage through the use of the restrictions, "the question remains whether it is one which [it] is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell." *Dr. Miles Medical Co., supra,* at 407–408. And, Mr. Justice Hughes continued:

> "As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system." *Id.,* at 408.

The milk in the coconut is that White Motor "having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." *Id.,* at 409.

Today the Court does a futile act in remanding this case for trial. In my view appellant cannot plead nor prove an issue upon which a successful defense of its contracts can be predicated. Neither time (I note the case is

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[1] H. R. 6544, 84th Cong., 1st Sess. The bill was never reported from the Committee.

now in its sixth year) nor all of the economic analysts, the statisticians, the experts in marketing, or for that matter the ingenuity of lawyers, can escape the unalterable fact that these contracts eliminate competition and under our cases are void. The net effect of the remand is therefore but to extend for perhaps an additional five years White Motor's enjoyment of the fruits of its illegal action. Certainly the decision has no precedential value [2] in substantive antitrust law.

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[2] Our recent certification of the amendment to the summary judgment procedure under Rule 56, quoted in the Court's opinion, will eliminate the problem posed here, *i. e.*, the sufficiency of the record.

# BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 730. Decided March 4, 1963.

Pursuant to § 6 of the Railway Labor Act, respondent railroads served on petitioners, unions of operating employees, notices of intended changes in agreements affecting rates of pay, rules and working conditions. After lengthy negotiations had failed to produce agreement concerning the proposed changes, the parties agreed to the creation of a Presidential Railroad Commission to investigate and report on the controversy and to use its best efforts to bring about an amicable settlement by mediation. The appointment and efforts of such a Commission having failed to produce agreement, the unions applied for the services of the National Mediation Board under § 5. Many meetings between the parties under the auspices of that Board having failed to produce agreement, and the unions having refused to submit the dispute to arbitration, the Board terminated its services. The railroads then served notice on the unions that the proposed changes would be placed in effect 30 days later. The unions sued in a Federal District Court for a judgment that the proposed rule changes would violate the Act. The District Court dismissed the complaint after finding that both parties had exhausted all procedures available under the Act and that, therefore, they were free to resort to self-help, subject only to the appointment of an Emergency Board by the President under § 10. The Court of Appeals affirmed, and the unions petitioned this Court for certiorari. *Held:* Certiorari is granted and the judgment is affirmed. Pp. 285–291.

(a) The courts below correctly rejected the contention of the unions that the standards contained in the railroads' notices violated the Act, since the Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. Pp. 289–290.

(b) The record sustains the findings of both lower courts that the parties have exhausted the procedures provided by the Act for major disputes such as that involved here and that the parties are

relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10, providing for the creation of an Emergency Board. Pp. 290–291.

310 F. 2d 503, affirmed.

*Harry Wilmarth, Edward B. Henslee, Jr., Ruth Weyand, Milton Kramer, Lester P. Schoene, Harold N. McLaughlin* and *Harold C. Heiss* for petitioners.

*Hermon M. Wells* for respondents.

PER CURIAM.

Certiorari is granted and the judgment of the Court of Appeals is affirmed for the reasons stated in this opinion.

The petitioners, hereinafter referred to as the Organizations, are the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America. The respondents, hereinafter referred to as the Carriers, are the Baltimore & Ohio Railroad Company and 15 other named railroad companies, as representatives of a class of more than 200 such companies.

In February of 1959, the Association of American Railroads proposed the creation of a presidential commission to investigate and report on the possibility of a radical overhaul of working rules affecting the Organizations and their members in the light of substantial technological changes in the railroad industry. The basis for this proposal was that ". . . drawing up sound new work standards for the railroad industry has become so complex and challenging that the machinery provided for settling ordinary disputes appears hopelessly inadequate to cope with this task." The Organizations opposed this proposal, and the President of the United States, in September of 1959, refused to appoint such a commission.

On November 2 of that year, pursuant to § 6 of the Railway Labor Act,[1] the Carriers served on the Organizations notices of intended changes in agreements affecting rates of pay, rules, and working conditions. After conferences both on individual railroads and on a national level had failed to produce agreement concerning the proposed changes, the Organizations and the Carriers in October of 1960, under the auspices of the Secretary of Labor, agreed to the creation of a Presidential Railroad Commission which was to investigate and report on the controversy, and was also authorized "to use its best efforts, by mediation, to bring about an amicable settlement . . . ."[2] The parties agreed that the proceedings

[1] Section 6 of the Railway Labor Act, as amended, 45 U. S. C. § 156, provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

[2] This authorization echoed the words of § 5 First of the Railway Labor Act, as amended, 45 U. S. C. § 155 First:

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

[*Footnote 2 continued on p. 287*]

of the Commission were to be accepted ". . . as in lieu of the mediation and emergency board procedures provided by Section[s] 5 and 10 of the Railway Labor Act." The Commission was created by Executive Order 10891 in November of 1960, and its members were appointed in December of that year.

The report and recommendations of the Commission were delivered to the President on February 28, 1962, and national conferences on the issues which remained in dispute resumed on April 2 and continued through May 17. No agreement having been reached, the Organizations on May 21 made application for the mediation services of the National Mediation Board pursuant to § 5 of the Railway Labor Act.[3] Between May 25 and June 22, approximately 32 meetings were held by the Organiza-

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"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

[3] See note 2, *supra*.

tions and the Carriers under the auspices of the Chairman of that Board, but no agreement was reached. The Organizations having refused to submit the dispute to arbitration, the National Mediation Board on July 16 terminated its services under the provisions of the Railway Labor Act.

On the following day, the Carriers served notice on the Organizations that, as of August 16, 1962, changes in rules, rates of pay, and working conditions would be placed in effect by the Carriers. On July 26, the Organizations brought the present suit seeking a judgment that the proposed rule changes would violate the Railway Labor Act. Subsequently, the Carriers, with leave of court and without objection from the Organizations, withdrew their July 17, 1962, notices, and substituted therefor the notices which had been served on November 2, 1959, to become effective August 16, 1962. The Organizations' complaint was then amended to seek similar relief against those notices.

The District Court found that both parties had exhausted all of the procedures available under the Railway Labor Act, and that they were therefore free to resort to self-help, restricted only by the possibility of the appointment of an Emergency Board by the President under the provisions of § 10 of the Railway Labor Act.[4] It

[4] Section 10 of the Railway Labor Act, as amended, 45 U. S. C. § 160, provides:

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member

therefore dismissed the complaint for failure to state a cause of action. The Court of Appeals affirmed. 310 F. 2d 503.

The petitioners insist that, because the Court of Appeals characterized the Organizations' actions as reducing negotiations to "sterile discussion," its opinion must be read as holding that the right of the Carriers to serve the § 6 notices here at issue somehow arose as a penalty for the Organizations' failure to bargain in good faith. No evidence was introduced below as to the good faith of either of the parties during the lengthy bargaining proceedings prior to the institution of this suit, and there is nothing in the record before us to indicate that either party acted in bad faith. Any contrary implication in the opinion of the Court of Appeals is disapproved.

The Court of Appeals concluded, as had the District Court, that the Railway Labor Act procedures had been exhausted, and that therefore the § 6 notices served by the Carriers were proper. The Court of Appeals correctly rejected the contention of the Organizations that the standards contained in the notices themselves violated the Railway Labor Act. As this Court has pointed out, "[t]he Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which

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appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

. . . . . .

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

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agreement may be reached with respect to them. The national interest . . . is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . ." *Terminal Assn.* v. *Trainmen,* 318 U. S. 1, 6. See also *Labor Board* v. *American Ins. Co.,* 343 U. S. 395, 402.

The only question presented, therefore, is whether the record before us sustains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here. As this Court stated in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 725:

> ". . . [t]he parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

The 1960 agreement establishing the Presidential Commission contained a provision purporting to accept the Commission's proceedings as a replacement for the procedures required by the Railway Labor Act. Whether or not such a provision could effectively forestall either party from resorting to the procedures of § 5 of the Act is a question which we need not decide, because the services of the National Mediation Board were in fact specifically invoked by the Organizations, and the Board's procedures were exhausted. Similarly, although arbitration

pursuant to § 7 [5] was refused by the Organizations, that section clearly provides that "the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

There is, consequently, no question of bad faith or misconduct on the part of either party justifying the other side's unilateral imposition of changes in working rules. What is clear, rather, is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board.[6] And on this basis the judgment below must be, and is

*Affirmed.*

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

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[5] Section 7 First of the Railway Labor Act, as amended, 45 U. S. C. § 157 First, provides:

"First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151–156 of this title such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

[6] See note 4, *supra.*

The 1960 agreement establishing the Presidential Commission was "approved" by Secretary of Labor Mitchell. It provided that the parties accepted its proceedings ". . . as in lieu of the mediation and emergency board procedures provided by Section[s] 5 and 10 of

Footnote 6—Continued.

the Railway Labor Act." In addition, the agreement somewhat inconsistently made provision for the invocation of the services of the National Mediation Board and for national bargaining conferences between the parties immediately following the report of the Commission. Finally, it provided that the agreement was not to be construed as a waiver of any legal right of any of the parties. We have already noted that the parties did in fact exhaust § 5 procedures. Neither party in this Court has contended that the 1960 agreement would affect the applicability of § 10. In any event, it is clear that no private agreement can interfere with the duty of the National Mediation Board or the power which § 10 confers upon the President of the United States.

Syllabus.

## TOWNSEND *v.* SAIN, SHERIFF, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 8. Argued February 19, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued October 8–9, 1962.—Decided March 18, 1963.

In a jury trial in a State Court, petitioner was convicted of murder and sentenced to death. After exhausting all state remedies, he petitioned a Federal District Court for a writ of habeas corpus, claiming that his conviction violated the Fourteenth Amendment because of the admission in evidence of a confession obtained while he was under the influence of drugs, including a "truth serum," administered by a police physician. Although the evidence was conflicting, the State Court had filed no opinion, conclusions of law or findings of fact. Respondents conceded in the District Court that a dispute existed as to whether the drug administered to petitioner was a "truth serum," as to its effects, and as to whether facts bearing on these questions had been concealed during the state-court hearing on the admissibility of the confession. Nevertheless, the District Court denied petitioner an opportunity to call witnesses or to produce other evidence in support of his allegations. It dismissed his petition on the ground that it was satisfied from the state-court records that the decision of the State Court, holding that the confession had been given freely and voluntarily, was correct and that there had been no denial of federal due process of law. The Court of Appeals affirmed. *Held:* On the record in this case, the District Court erred in denying a writ of habeas corpus without a plenary evidentiary hearing. Pp. 295–322.

1. The petition for habeas corpus alleged a deprivation of constitutional rights, because petitioner's confession was constitutionally inadmissible if it was adduced by police questioning during a period when petitioner's will was overborne by a drug having the properties of a "truth serum." Pp. 307–309.

2. When an application by a state prisoner to a Federal Court for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the Federal Court to which the application is made has the power to receive evidence and try the facts anew. Pp. 310–312.

3. Where the facts are in dispute, the Federal District Court must grant an evidentiary hearing if (1) the merits of the factual

dispute were not resolved in the state hearing, either at the time of the trial or in a collateral proceeding; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the State Court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing. Pp. 312–318.

(a) When the state trier of fact has made no express findings, the District Court must hold an evidentiary hearing if the State Court did not decide the issues of fact tendered to it, if the State Court applied an incorrect standard of constitutional law, or if, for any other reason, the District Court is unable to reconstruct the relevant findings of the state trier of fact. Pp. 313–316.

(b) The Federal District Court must carefully scrutinize the state-court record in order to determine whether the factual determinations of the State Court are fairly supported by the record. P. 316.

(c) Even if all the relevant facts were presented in the state-court hearing, it is the Federal Judge's duty to disregard the state findings and take evidence anew, if the procedure employed by the State Court appears to be seriously inadequate for the ascertainment of the truth. P. 316.

(d) Where newly discovered evidence which could not reasonably have been presented to the State Court is alleged, the Federal Court must grant an evidentiary hearing, unless the allegation of newly discovered evidence is irrelevant, frivolous or incredible. P. 317.

(e) If, for any reason not attributable to the inexcusable neglect of the applicant, evidence crucial to the adequate consideration of his constitutional claim was not developed at the state hearing, the Federal Court must grant an evidentiary hearing. P. 317.

(f) The duty to try the facts anew exists in every case in which the State Court has not, after a full hearing, reliably found the relevant facts. Pp. 317–318.

4. In all other cases where the material facts are in dispute, the holding of an evidentiary hearing is in the discretion of the Federal District Judge. P. 318.

5. Where the State Court has reliably found the relevant facts, the Federal District Judge may defer to the State Court's findings of fact; but he may not defer to the State Court's findings of law. P. 318.

6. A District Court sitting in habeas corpus has power to compel production of the complete state-court record or to hold an evidentiary hearing forthwith without compelling its production. Pp. 318–319.

7. It rests largely with the Federal District Judges to give practical form to the above principles and to make proper accommodation between the competing factors involved. P. 319.

8. In this case, the Court of Appeals erred in holding that, on habeas corpus, "the district court's inquiry is limited to a study of the *undisputed* portions of the record." Pp. 319–320.

9. In the circumstances of this case, the District Judge should have held an evidentiary hearing, because he could not reconstruct the relevant findings of the state trier of fact and because the characterization of the drug administered as a "truth serum" was not brought out at the state-court hearing. Pp. 320–322.

10. The state-court record is competent evidence at the District Court hearing, and either the petitioner or the State may rely solely upon the evidence contained in that record. P. 322.

276 F. 2d 324, reversed.

*George N. Leighton* reargued the cause and filed a brief for petitioner.

*Edward J. Hladis* reargued the cause for respondents. With him on the brief was *Daniel P. Ward.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case, in its present posture raising questions as to the right to a plenary hearing in federal habeas corpus, comes to us once again after a tangle of prior proceedings. In 1955 the petitioner, Charles Townsend, was tried before a jury for murder in the Criminal Court of Cook County, Illinois. At his trial petitioner, through his court-appointed counsel, the public defender, objected to the

introduction of his confession on the ground that it was the product of coercion. A hearing was held outside the presence of the jury, and the trial judge denied the motion to suppress. He later admitted the confession into evidence. Further evidence relating to the issue of voluntariness was introduced before the jury. The charge permitted them to disregard the confession if they found that it was involuntary. Under Illinois law the admissibility of the confession is determined solely by the trial judge, but the question of voluntariness, because it bears on the issue of credibility, may also be presented to the jury. See, *e. g., People* v. *Schwartz,* 3 Ill. 2d 520, 523, 121 N. E. 2d 758, 760; *People* v. *Roach,* 369 Ill. 95, 15 N. E. 2d 873. The jury found petitioner guilty and affixed the death penalty to its verdict. The Supreme Court of Illinois affirmed the conviction, two justices dissenting. *People* v. *Townsend,* 11 Ill. 2d 30, 141 N. E. 2d 729. This Court denied a writ of certiorari. 355 U. S. 850.

Petitioner next sought post-conviction collateral relief in the Illinois State courts. The Cook County Criminal Court dismissed his petition without holding an evidentiary hearing. The Supreme Court of Illinois by order affirmed, holding that the issue of coercion was *res judicata,* and this Court again denied certiorari. 358 U. S. 887. The issue of coercion was pressed at all stages of these proceedings.

Having thoroughly exhausted his state remedies, Townsend petitioned for habeas corpus in the United States District Court for the Northern District of Illinois. That court, considering only the pleadings filed in the course of that proceeding and the opinion of the Illinois Supreme Court rendered on direct appeal, denied the writ. The Court of Appeals for the Seventh Circuit dismissed an appeal. 265 F. 2d 660. However, this Court granted a petition for certiorari, vacated the judgment and remanded for a decision as to whether, in the light of the

state-court record, a plenary hearing was required. 359 U. S. 64.

On the remand, the District Court held no hearing and dismissed the petition, finding only that "Justice would not be served by ordering a full hearing or by awarding any or all of [the] relief sought by Petitioner." The judge stated that he was satisfied from the state-court records before him that the decision of the state courts holding the challenged confession to have been freely and voluntarily given by petitioner was correct, and that there had been no denial of federal due process of law. On appeal the Court of Appeals concluded that "[o]n habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record" and that the undisputed portions of this record showed no deprivation of constitutional rights. 276 F. 2d 324, 329. We granted certiorari to determine whether the courts below had correctly determined and applied the standards governing hearings in federal habeas corpus. 365 U. S. 866. The case was first argued during the October Term 1961. Two of the Justices were unable to participate in a decision, and we subsequently ordered it reargued. 369 U. S. 834. We now have it before us for decision.

The undisputed evidence adduced at the trial-court hearing on the motion to suppress showed the following. Petitioner was arrested by Chicago police shortly before or after 2 a. m. on New Year's Day 1954. They had received information from one Campbell, then in their custody for robbery, that petitioner was connected with the robbery and murder of Jack Boone, a Chicago steelworker and the victim in this case. Townsend was 19 years old at the time, a confirmed heroin addict and a user of narcotics since age 15. He was under the influence of a dose of heroin administered approximately one and one-half hours before his arrest. It was his practice to take injections three to five hours apart. At about 2:30 a. m.

petitioner was taken to the second district police station and, shortly after his arrival, was questioned for a period variously fixed from one-half to two hours. During this period, he denied committing any crimes. Thereafter at about 5 a. m. he was taken to the 19th district station where he remained, without being questioned, until about 8:15 p. m. that evening. At that time he was returned to the second district station and placed in a line-up with several other men so that he could be viewed by one Anagnost, the victim of another robbery. When Anagnost identified another man, rather than petitioner, as his assailant, a scuffle ensued, the details of which were disputed by petitioner and the police. Following this incident petitioner was again subjected to questioning. He was interrogated more or less regularly from about 8:45 until 9:30 by police officers. At that time an Assistant State's Attorney arrived. Some time shortly before or after nine o'clock, but before the arrival of the State's Attorney, petitioner complained to Officer Cagney that he had pains in his stomach, that he was suffering from other withdrawal symptoms, that he wanted a doctor, and that he was in need of a dose of narcotics. Petitioner clutched convulsively at his stomach a number of times. Cagney, aware that petitioner was a narcotic addict, telephoned for a police physician. There was some dispute between him and the State's Attorney, both prosecution witnesses, as to whether the questioning continued until the doctor arrived. Cagney testified that it did and the State's Attorney to the contrary. In any event, after the withdrawal symptoms commenced it appears that petitioner was unresponsive to questioning. The doctor appeared at 9:45. In the presence of Officer Cagney he gave Townsend a combined dosage by injection of 1/8-grain of phenobarbital and 1/230-grain of hyoscine. Hyoscine is the same as scopolamine and is claimed by petitioner in this proceeding to have the properties of a "truth serum."

The doctor also left petitioner four or five ¼-grain tablets of phenobarbital. Townsend was told to take two of these that evening and the remainder the following day. The doctor testified that these medications were given to petitioner for the purpose of alleviating the withdrawal symptoms; the police officers and the State's Attorney testified that they did not know what the doctor had given petitioner. The doctor departed between 10 and 10:30. The medication alleviated the discomfort of the withdrawal symptoms, and petitioner promptly responded to questioning.

As to events succeeding this point in time on January 1, the testimony of the prosecution witnesses and of the petitioner irreconcilably conflicts. However, for the purposes of this proceeding both sides agree that the following occurred. After the doctor left, Officer Fitzgerald and the Assistant State's Attorney joined Officer Cagney in the room with the petitioner, where he was questioned for about 25 minutes. They all then went to another room; a court reporter there took down petitioner's statements. The State's Attorney turned the questioning to the Boone case about 11:15. In less than nine minutes a full confession was transcribed. At about 11:45 the questioning was terminated, and petitioner was returned to his cell.

The following day, Saturday, January 2, at about 1 p. m. petitioner was taken to the office of the prosecutor where the Assistant State's Attorney read, and petitioner signed, transcriptions of the statements which he had made the night before. When Townsend again experienced discomfort on Sunday evening, the doctor was summoned. He gave petitioner more ¼-grain tablets of phenobarbital. On Monday, January 4, Townsend was taken to a coroner's inquest where he was called to the witness stand by the State and, after being advised of his right not to testify, again confessed. At the time of the inquest petitioner was without counsel. The public defender was not

appointed to represent him until his arraignment on January 12.

Petitioner testified at the motion to suppress to the following version of his detention. He was initially questioned at the second district police station for a period in excess of two hours. Upon his return from the 19th district and after Anagnost, the robbery victim who had viewed the line-up, had identified another person as the assailant, Officer Cagney accompanied Anagnost into the hall and told him that he had identified the wrong person. Another officer then entered the room, hit the petitioner in the stomach and stated that petitioner knew that he had robbed Anagnost. Petitioner fell to the floor and vomited water and a little blood. Officer Cagney spoke to Townsend 5 or 10 minutes later, Townsend told him that he was sick from the use of drugs, and Cagney offered to call a doctor if petitioner would "cooperate" and tell the truth about the Boone murder. Five minutes later the officer had changed his tack; he told petitioner that he thought him innocent and that he would call the doctor, implying that the doctor would give him a narcotic. The doctor gave petitioner an injection in the arm and five pills. Townsend took three of these immediately. Although he felt better, he felt dizzy and sleepy and his distance vision was impaired. Anagnost was then brought into the room, and petitioner was asked by someone to tell Anagnost that he had robbed him. Petitioner then admitted the robbery, and the next thing he knew was that he was sitting at a desk. He fell asleep but was awakened and handed a pen; he signed his name believing that he was going to be released on bond. Townsend was taken to his cell but was later taken back to the room in which he had been before. He could see "a lot of lights flickering," and someone told him to hold his head up. This went on for a minute or so, and petitioner was then again taken back to his cell. The next morning peti-

tioner's head was much clearer, although he could not really remember what had occurred following the injection on the previous evening. An officer then told petitioner that he had confessed. Townsend was taken into a room and asked about a number of robberies and murders. "I believe I said yes to all of them." He could not hear very well and felt sleepy. That afternoon, after he had taken the remainder of the phenobarbital pills, he was taken to the office of the State's Attorney. Half asleep he signed another paper although not aware of its contents. The doctor gave him six or seven pills of a different color on Sunday evening. He took some of these immediately. They kept him awake all night. The following Monday morning he took more of these pills. Later that day he was taken to a coroner's inquest. He testified at the inquest because the officers had told him to do so.

Essentially the prosecution witnesses contradicted all of the above. They testified that petitioner had been questioned initially for only one-half hour, that he had scuffled with the man identified by Anagnost, and not an officer, and that he had not vomited. The officers and the Assistant State's Attorney also testified that petitioner had appeared to be awake and coherent throughout the evening of the 1st of January and at all relevant times thereafter, and that he had not taken the pills given to him by the doctor on the evening of the 1st. They stated that the petitioner had appeared to follow the statement which he signed and which was read to him at the State's Attorney's office. Finally they denied that any threats or promises of any sort had been made or that Townsend had been told to testify at the coroner's inquest. As stated above counsel was not provided for him at this inquest.

There was considerable testimony at the motion to suppress concerning the probable effects of hyoscine and phenobarbital. Dr. Mansfield, who had prescribed for

petitioner on the evening when he had first confessed, testified for the prosecution. He stated that a full therapeutic dose of hyoscine was 1/100 of a grain; that he gave Townsend 1/230 of a grain; that "phenobarbital . . . reacts very well combined with [hyoscine when] . . . you want to quiet" a person; that the combination will "pacify" because "it has an effect on the mind"; but that the dosage administered would not put a person to sleep and would not cause amnesia or impairment of eyesight or of mental condition. The doctor denied that he had administered any "truth serum." However, he did not disclose that hyoscine is the same as scopolamine or that the latter is familiarly known as "truth serum." Petitioner's expert was a doctor of physiology, pharmacology and toxicology. He was formerly the senior toxicological chemist of Cook County and at the time of trial was a professor of pharmacology, chemotherapy and toxicology at the Loyola University School of Medicine. He testified to the effect of the injection upon a hypothetical subject, obviously the petitioner. The expert stated that the effect of the prescribed dosage of hyoscine upon the subject, assumed to be a narcotic addict, "would be of such a nature that it could range between absolute sleep . . . and drowsiness, as one extreme, and the other extreme . . . would incorporate complete disorientation and excitation . . . ." And, assuming that the subject took 1/8-grain phenobarbital by injection and 1/2-grain orally at the same time, the expert stated that the depressive effect would be accentuated. The expert testified that the subject would suffer partial or total amnesia for five to eight hours and loss of near vision for four to six hours.

The trial judge summarily denied the motion to suppress and later admitted the court reporter's transcription of the confession into evidence. He made no findings of fact and wrote no opinion stating the grounds of his deci-

sion.[1] Thereafter, for the purpose of testing the credibility of the confession, the evidence relating to coercion was placed before the jury. At that time additional noteworthy testimony was elicited. The identity of hyoscine and scopolamine was established (but no mention of the drug's properties as a "truth serum" was made). An expert witness called by the prosecution testified that Townsend had such a low intelligence that he was a near mental defective and "just a little above moron." Townsend testified that the officers had slapped him on several occasions and had threatened to shoot him. Finally, Officer Corcoran testified that about 9 p. m., Friday evening before the doctor's arrival, Townsend had confessed to the Boone assault and robbery in response to a question propounded by Officer Cagney in the presence of Officers Fitzgerald, Martin and himself. But although Corcoran, Cagney and Martin had testified extensively at the motion to suppress, none had mentioned any such confession. Furthermore, both Townsend and Officer Fitzgerald at the motion to suppress had flatly said that no statement had been made before the doctor arrived. Although the other three officers testified at the trial, not one of them was asked to corroborate this phase of Corcoran's testimony.

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[1] The final defense witness who testified at the motion to suppress was excused. The following then transpired:

"MR. BRANION [a defense attorney]: That's all we have, if the Court please.

"The COURT: The defense rests on this hearing?

"MR. BRANION: Defense rests.

"The COURT: Anything further from the State?

"MR. MCGOVERN: The State rests for the purpose of this hearing, Judge.

"The COURT: Gentlemen, the Court will deny the motion to suppress and admit the statement into evidence and we will proceed with the presentation of the evidence [to the jury]."

It was established that the homicide occurred at about 6 p. m. on December 18, 1953. Essentially the only evidence which connected petitioner with the crime, other than his confession, was the testimony of Campbell, then on probation for robbery, and of the pathologist who performed the autopsy on Boone. Campbell testified that about the "middle" of December at about 8:30 p. m. he had seen Townsend walking down a street in the vicinity of the murder with a brick in his hand. He was unable to fix the exact date, did not know of the Boone murder at the time and, so far as his testimony revealed, had no reason to suspect that Townsend had done anything unlawful previous to their meeting.

The pathologist testified that death was caused by a "severe blow to the top of his [Boone's] head . . . ." Contrary to the statement in the opinion of the Illinois Supreme Court on direct appeal there was no testimony that the wounds were "located in such a manner as to have been inflicted by a blow with a house brick . . . ." 11 Ill. 2d, at 45, 141 N. E. 2d, at 737. In any event, that court characterized the evidence as meagre and noted that "it was brought out by cross-examination that Campbell had informed on the defendant to obtain his own release from custody." 11 Ill. 2d, at 44, 45, 141 N. E. 2d, at 737. Prior to petitioner's trial Campbell was placed on probation for robbery. Justice Schaefer, joined by Chief Justice Klingbiel in dissent, found Campbell's testimony "inherently incredible." 11 Ill. 2d, at 49, 141 N. E. 2d, at 739.

The theory of petitioner's application for habeas corpus did not rest upon allegations of physical coercion. Rather, it relied upon the hitherto undisputed testimony and alleged: (1) that petitioner vomited water and blood at the police station when he became ill from the withdrawal of narcotics; (2) that scopolamine is a "truth serum" and that this fact was not brought out at the motion to sup-

press or at the trial; (3) that scopolamine "either alone or combined with Phenobarbital, is not the proper medication for a narcotic addict [and that] . . . [t]he effect of the intravenous injection of hyoscine and phenobarbital . . . is to produce a physiological and psychological condition adversely affecting the mind and will . . . [and] a psychic effect which removes the subject thus injected from the scope of reality; so that the person so treated is removed from contact with his environment, he is not able to see and feel properly, he loses proper use of his eye-sight, his hearing and his sense of perception and his ability to withstand interrogation"; (4) that the police doctor willfully suppressed this information and information of the identity of hyoscine and scopolamine, of his knowledge of these things, and of his intention to inject the hyoscine for the purpose of producing in Townsend "a physiological and psychological state . . . susceptible to interrogation resulting in . . . confessions . . ."; (5) that the injection caused Townsend to confess; (6) that on the evening of January 1, immediately after the injection of scopolamine, petitioner confessed to three murders and one robbery other than the murder of Boone and the robbery of Anagnost. Although there was some mention of other confessions at the trial, only the confession to the Anagnost robbery was specifically testified to.

Initially, in their answer, respondents stated: "Respondents admit the factual allegations of the petition well pleaded, but deny that Petitioner is held in custody by Respondents in violation of the constitution or laws of the United States . . . ." However, in the course of the first argument before the District Court it appeared that respondents admitted nothing alleged in the petition but merely took the position that the petition, on its face, was insufficient to entitle Townsend either to a hearing or to his release. In the course of the second argument, after the remand by this Court, respondents admitted

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that "if the allegations of the petition are taken as true, then the petitioner is entitled to the relief he seeks . . . ," and that Townsend had confessed to at least five crimes after the injection of hyoscine. But respondents denied that "petitioner was adversely influenced by its [the hyoscine's] administration to the extent that his confession was obtained involuntarily"; that "Hyoscine is the truth serum"; that "the police surgeon or the prosecution concealed pertinent, material and relevant facts"; or that hyoscine was an improper medication under the circumstances. Despite respondents' concession that a dispute as to these facts existed, the district judge denied Townsend the opportunity to call witnesses or to produce other evidence in support of his allegations and dismissed the petition.

Before we granted the most recent petition for certiorari we requested respondents to submit an additional response directed to certain of the allegations of the petition for habeas corpus. Respondents submitted an "additional answer to petition for habeas corpus" in which they again admitted that Townsend had made confessions immediately after the injection of drugs. Specifically they admitted that petitioner confessed to the robberies of Anagnost and one Joseph Martin and to the murders of Boone, Thomas Johnson, Johnny Stinson, and Willis Thompson. The additional answer revealed the following additional information respecting Townsend's confessions to these crimes. Anagnost had identified another person, rather than petitioner, as his assailant. Thomas Johnson, before his death, had stated that his injury had been an accident. The Assistant State's Attorney did not even bother to transcribe Townsend's statement with respect to Thompson's murder "because the defendant could not recall the details of the assault which led to the death . . . ." At the Thompson coroner's inquest, when

the deputy coroner noted that Townsend was then unable to remember even that he had committed the crime, Officer Cagney complained: "Why shouldn't we be given credit for these Clean-ups." Despite these circumstances which made conviction for the Anagnost robbery and the Johnson and Thompson murders, at best, a remote possibility, petitioner was indicted for all of the crimes to which he had confessed. However, after a jury trial, he was acquitted of the murder of Johnny Stinson, and on the very day that he was sentenced to death for the Boone murder, on the motion of the prosecutor, the indictments for the murders of Johnson and Thompson and for the robberies of Anagnost and Martin were dismissed.

Although the petition for habeas corpus contains allegations which would constitute a claim that the police doctor, at the trial, had perjured himself, the heart of Townsend's claim is that his confession was inadmissible simply because it was caused by the injection of hyoscine. We must first determine whether petitioner's allegations, if proved, would establish the right to his release.

I.

Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's "will was overborne" [2] or if his confession was not "the product of a rational intellect and a free will," [3] his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought

[2] *Reck* v. *Pate*, 367 U. S. 433, 440.

[3] *Blackburn* v. *Alabama*, 361 U. S. 199, 208.

about by a drug having the effect of a "truth serum." [4] It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum," if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible.[5] The

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[4] Of course, there are many relevant circumstances in this case which a district judge would be required to consider in determining whether the injection of scopolamine caused Townsend to confess. Among these are his lack of counsel at the time, his drug addiction, the fact that he was a "near mental defective," and his youth and inexperience.

[5] Respondents do not dispute this. In fact at the time of the second argument before the District Court respondents stated:

"If it was a fact—to put it very bluntly as we will very shortly, and elaborate upon it—if a truth serum was administered to the petitioner and he was influenced by the truth serum and gave an involuntary confession, upon which his conviction was obtained, then that is it."

It is at least generally recognized that the administration of sufficient doses of scopolamine will break down the will. Thus, it is stated in The Dispensatory of the United States (25th ed. 1955) 1223: "Many persons are excessively susceptible to scopolamine and toxic symptoms may occur; such symptoms are often very alarming. There are marked disturbances of intellection, ranging from complete disorientation to an active delirium . . . ." The early literature on the subject designated scopolamine as a "truth serum." It was thought to produce true confessions by criminal suspects. *E. g.*, House, Why Truth Serum Should be Made Legal, 42 Medico-Legal Journal 138 (1925). And as recently as 1940 Dean Wigmore suggested that scopolamine might be useful in criminal interrogation. 3 Wigmore on Evidence (3d ed. 1940) § 998, at 642. However, some more recent commentators suggest that scopolamine's use is not likely to produce true confessions. On the contrary it is said:

"Unfortunately, persons under the influence of drugs are very suggestible and may confess to crimes which they have not committed. False or misleading answers may be given, especially when questions are improperly phrased. For example, if the police officer asserted in a confident tone 'You did steal the money, didn't you?', a

Court has usually so stated the test. See, *e. g., Stroble* v. *California,* 343 U. S. 181, 190: "If the confession which petitioner made . . . was in fact involuntary, the conviction cannot stand . . . ." And in *Blackburn* v. *Alabama,* 361 U. S. 199, we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.

Thus we conclude that the petition for habeas corpus alleged a deprivation of constitutional rights. The remaining question before us then is whether the District Court was required to hold a hearing to ascertain the facts which are a necessary predicate to a decision of the ultimate constitutional question.

The problem of the power and duty of federal judges, on habeas corpus, to hold evidentiary hearings—that is, to try issues of fact [6] anew—is a recurring one. The Court last dealt at length with it in *Brown* v. *Allen,* 344 U. S. 443, in opinions by Justices Reed and Frankfurter, both speaking for a majority of the Court. Since then,

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suggestible suspect might easily give a false affirmative answer." MacDonald, Truth Serum, 46 J. Crim. L. 259, 259–260 (1955). We make no findings as to either the medical properties of scopolamine or the likely effect of the dosage administered to Townsend. However, whether scopolamine produces true confessions or false confessions, if it in fact caused Townsend to make statements, those statements were constitutionally inadmissible.

[6] By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." *Brown* v. *Allen,* 344 U. S. 443, 506 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

we have but touched upon it.[7] We granted certiorari in the 1959 Term to consider the question, but ultimately disposed of the case on a more immediate ground. *Rogers* v. *Richmond,* 365 U. S. 534, 540. It has become apparent that the opinions in *Brown* v. *Allen, supra,* do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results.[8] We mean to express no opinion on the correctness of particular decisions. But we think that it is appropriate at this time to elaborate the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings.

## II.

The broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus are reviewed at length in the Court's opinion in *Fay*

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[7] See *Thomas* v. *Arizona,* 356 U. S. 390; *Rogers* v. *Richmond,* 357 U. S. 220 (denial of certiorari with accompanying statement); *United States ex rel. Jennings* v. *Ragen,* 358 U. S. 276 (*per curiam*); *Townsend* v. *Sain,* 359 U. S. 64 (*per curiam*) (vacating judgment on authority of *Jennings* v. *Ragen, supra*).

[8] See, *e. g., United States ex rel. Tillery* v. *Cavell,* 294 F. 2d 12 (C. A. 3d Cir.); *Schlette* v. *People,* 284 F. 2d 827 (C. A. 9th Cir.); *Bolling* v. *Smyth,* 281 F. 2d 192 (C. A. 4th Cir.); *Chavez* v. *Dickson,* 280 F. 2d 727 (C. A. 9th Cir.); *Gay* v. *Graham,* 269 F. 2d 482 (C. A. 10th Cir.); *United States ex rel. Rogers* v. *Richmond,* 252 F. 2d 807 (C. A. 2d Cir.), cert. denied with accompanying statement, 357 U. S. 220; *United States ex rel. Alvarez* v. *Murphy,* 246 F. 2d 871 (C. A. 2d Cir.); *Tyler* v. *Pepersack,* 235 F. 2d 29 (C. A. 4th Cir.); *Cranor* v. *Gonzales,* 226 F. 2d 83 (C. A. 9th Cir.); *United States ex rel. De Vita* v. *McCorkle,* 216 F. 2d 743 (C. A. 3d Cir.). See also Note, Habeas Corpus: Developments Since Brown v. Allen: A Survey and Analysis, 53 Nw. U. L. Rev. 765; Comment, Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion, 68 Yale L. J. 98.

v. *Noia, post,* p. 391, and need not be repeated here. We pointed out there that the historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day. We pointed out, too, that the Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386, which in extending the federal writ to state prisoners described the power of the federal courts to take testimony and determine the facts *de novo* in the largest terms, restated what apparently was the common-law understanding. *Fay* v. *Noia, post,* p. 416, n. 27. The hearing provisions of the 1867 Act remain substantially unchanged in the present codification. 28 U. S. C. § 2243. In construing the mandate of Congress, so plainly designed to afford a trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detentions, this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention. "Since *Frank* v. *Mangum,* 237 U. S. 309, 331, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution,' even though the events which were alleged to infringe did not appear upon the face of the record of his conviction." *Hawk* v. *Olson,* 326 U. S. 271, 274. *Brown* v. *Allen* and numerous other cases have recognized this.

The rule could not be otherwise. The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal

channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. See *Frank* v. *Mangum,* 237 U. S. 309, 345–350 (dissenting opinion of Mr. Justice Holmes). It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

## III.

We turn now to the considerations which in certain cases may make exercise of that power mandatory. The appropriate standard—which must be considered to supersede, to the extent of any inconsistencies, the opinions in *Brown* v. *Allen*—is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required

unless the state-court trier of fact has after a full hearing reliably found the relevant facts.[9]

It would be unwise to overly particularize this test. The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discretion must be left in very large part the administration of federal habeas corpus. But experience proves that a too general standard—the "exceptional circumstances" and "vital flaw" tests of the opinions in *Brown* v. *Allen*—does not serve adequately to explain the controlling criteria for the guidance of the federal habeas corpus courts. Some particularization may therefore be useful. We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

(1) There cannot even be the semblance of a full and fair hearing unless the state court actually reached and

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[9] In announcing this test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law.

The existence of the exhaustion of state remedies requirement (announced in *Ex parte Royall*, 117 U. S. 241, and now codified in 28 U. S. C. § 2254) lends support to the view that a federal hearing is not always required. It presupposes that the State's adjudication of the constitutional issue can be of aid to the federal court sitting in habeas corpus.

decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits. If relief has been denied in prior state collateral proceedings after a hearing but without opinion, it is often likely that the decision is based upon a procedural issue—that the claim is not collaterally cognizable—and not on the merits. On the other hand, if the prior state hearing occurred in the course of the original trial—for example, on a motion to suppress allegedly unlawful evidence, as in the instant case—it will usually be proper to assume that the claim was rejected on the merits.

If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal

constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence, such as was present in *Rogers* v. *Richmond,* that there is reason to suspect that an incorrect standard was in fact applied.[10] Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.

In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the "so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration." *Rogers* v. *Richmond, supra,* at 546. See *Frank* v. *Mangum, supra,* at 347 (Holmes, J., dissenting). Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The fed-

[10] Of course, under *Rogers* v. *Richmond,* a new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law. However, there will be situations in which statements of the trier of fact will do no more than create doubt as to whether the correct standard has been applied. In such situations a District Court hearing to determine the constitutional issue will be necessary.

eral court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

(2) This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. *Fiske* v. *Kansas*, 274 U. S. 380, 385; *Blackburn* v. *Alabama*, 361 U. S. 199, 208–209. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See, *e. g.*, *Blackburn* v. *Alabama*, *supra*; *Moore* v. *Michigan*, 355 U. S. 155. The duty of the Federal District Court on habeas is no less exacting.

(3) However, the obligation of the Federal District Court to scrutinize the state-court findings of fact goes farther than this. Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results. If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required. Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew. Of course, there are procedural errors so grave as to require an appropriate order directing the habeas applicant's release unless the State grants a new trial forthwith. Our present concern is with errors which, although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.

(4) Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation of newly discovered evidence.

(5) The conventional notion of the kind of newly discovered evidence which will permit the reopening of a judgment is, however, in some respects too limited to provide complete guidance to the federal district judge on habeas. If, for any reason not attributable to the inexcusable neglect of petitioner, see *Fay* v. *Noia, post,* p. 438 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexcusable default set down in *Fay* v. *Noia* adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures. Compare *Price* v. *Johnston,* 334 U. S. 266, 291: "The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

(6) Our final category is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded. It is the province of the district judges first to determine such necessities in ac-

cordance with the general rules. The duty to try the facts anew exists in every case in which the state court has not after a full hearing reliably found the relevant facts.

IV.

It is appropriate to add a few observations concerning the proper application of the test we have outlined.

*First.* The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim. There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. We have no fear that the hearing power will be used to subvert the integrity of state criminal justice or to waste the time of the federal courts in the trial of frivolous claims.

*Second.* Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in *Brown* v. *Allen, supra,* at 506 (opinion of Mr. Justice Frankfurter).

*Third.* A District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. Ordinarily such a record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings. See *United States ex rel. Jennings* v. *Ragan,* 358 U. S. 276; *Townsend* v. *Sain,* 359 U. S. 64. Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so.

*Fourth.* It rests largely with the federal district judges to give practical form to the principles announced today. We are aware that the too promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their paramount responsibility in this area.

## V.

Application of the foregoing principles to the particular litigation before us is not difficult. Townsend received an evidentiary hearing at his original trial, where his confession was held to be voluntary. Having exhausted his

state remedies without receiving any further such hearing, he turned to the Federal District Court. Twice now, habeas corpus relief has been denied without an evidentiary hearing. On appeal from the second denial, the Court of Appeals held that "[o]n habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record." That formulation was error. And we believe that on this record it was also error to refuse Townsend an evidentiary hearing in the District Court. The state trial judge rendered neither an opinion, conclusions of law, nor findings of fact. He made no charge to the jury setting forth the constitutional standards governing the admissibility of confessions. In short, there are no indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession. The Illinois Supreme Court opinion rendered at the time of direct appeal contains statements which might indicate that the court thought the confession was admissible if it satisfied the "coherency" standard. Under that test the confession would be admissible "[s]o long as the accused [was] . . . capable of making a narrative of past events or of stating his own participation in the crime . . . ." 11 Ill. 2d, at 43, 141 N. E. 2d, at 736. As we have indicated in Part I of this opinion, this test is not the proper one. Possibly the state trial judge believed that the admissibility of allegedly drug-induced confessions was to be judged by the "coherency" standard.[11] However, even if this possibility could be eliminated, and it could be ascertained

[11] The charge to the jury dealt only with the issues of credibility so far as the confession was concerned. Even accepting the relevance of the instructions, there is nothing in the charge to the jury to show that the trial judge, like the Supreme Court, did not think that voluntariness was conclusively established by a showing that the defendant was coherent.

that correct standards of law were applied, it is still unclear whether the state trial judge would have excluded Townsend's confession as involuntary if he had believed the evidence which Townsend presented at the motion to suppress. The problem which the trial judge faced was novel and by no means without difficulty. We believe that the Federal District Court could not conclude that the state trial judge admitted the confession because he disbelieved the evidence which would show that it was involuntary. We believe that the findings of fact of the state trier could not be successfully reconstructed. We hold that, for this reason, an evidentiary hearing was compelled.[12]

Furthermore, a crucial fact was not disclosed at the state-court hearing: that the substance injected into Townsend before he confessed has properties which may trigger statements in a legal sense involuntary.[13] This fact was vital to whether his confession was the product of a free will and therefore admissible. To be sure, there was medical testimony as to the general properties of hyoscine, from which might have been inferred the con-

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[12] The dissent fails to say why a hearing was not required for this reason. And "accepting the Court's . . . hearing standards" as the dissent does, it cannot seriously be argued that a hearing was not compelled. True the state trial judge instructed the jury that it *could* disregard the confession on grounds of credibility if it believed the petitioner's expert. But this hardly indicates whether the trial judge, at the motion to suppress, himself disbelieved the expert or whether he thought that, notwithstanding the truth of the expert's testimony, the confession was voluntary.

[13] It appears that at the suppression hearing it was not disclosed that hyoscine (the substance injected, along with phenobarbital, into Townsend) was identical to scopolamine, and neither was it disclosed that scopolamine is familiarly known as "truth serum." Later on in the trial, there was testimony that hyoscine is identical to scopolamine, but not that scopolamine (or hyoscine) is a "truth serum."

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clusion that Townsend's power of resistance had been debilitated. But the crucially informative characterization of the drug, the characterization which would have enabled the judge and jury, mere laymen, intelligently to grasp the nature of the substance under inquiry, was inexplicably omitted from the medical experts' testimony. Under the circumstances, disclosure of the identity of hyoscine as a "truth serum" was indispensable to a fair, rounded, development of the material facts. And the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default. See *Fay* v. *Noia*, *post*, p. 438 (Part V).

On the remand it would not, of course, be sufficient for the District Court merely to hear new evidence and to read the state-court record. Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence,[14] and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues. This was not done here.

In deciding this case as we do, we do not mean to prejudge the truth of the allegations of the petition for habeas corpus. We decide only that on this record the federal district judge was obliged to hold a hearing.

*Reversed and remanded.*

MR. JUSTICE GOLDBERG, concurring.

I join in the opinion and judgment of the Court and add a few words by way of comment on the dissenting opinion of my Brother STEWART.

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[14] Cf. 28 U. S. C. §§ 2245, 2247.

I cannot agree with MR. JUSTICE STEWART that the instructions given to the jury by the trial judge on the issue of credibility indicate the application of a proper constitutional test to measure the voluntariness—and hence the admissibility—of the petitioner's disputed confession of the Boone murder. In my view, the very portions of the instructions excerpted by my Brother STEWART support, if anything, the contrary conclusion that an improper and constitutionally impermissible standard was utilized by the trial judge himself in the suppression hearing.

If, as suggested by my Brother STEWART, these instructions are taken to evidence the exclusionary standard applied by the trial judge in ruling on the petitioner's motion to suppress, they reflect error of constitutional dimension, as does the standard of admissibility contained in the affirming opinion of the Illinois Supreme Court. While the appellate court, as pointed out in the opinion of THE CHIEF JUSTICE, see *ante*, pp. 319–321, appears to have adopted a test of "coherency" to measure the admissibility of the confession, the trial court seemingly concluded that inducement of amnesia was a prerequisite to disregard of the confession. Both standards, whether or not intended to incorporate similar elements, fail to conform to the requisite test.

The third paragraph of the instructions quoted by my Brother STEWART in footnote 2, *post*, p. 330, advises the jury that it might discount the confession if it found that administration of the drug caused the petitioner to "lose his memory," to suffer "a state of amnesia" during the period of questioning, *and* to be unable "to control his answers or to assert his will by denying the crime charged." By use of the conjunctive to incorporate the requirement of loss of control, this instruction indicates the trial court's apparent view that if the drug had the effect of overbearing the petitioner's will but did not also cause loss of

memory, the confession would nonetheless remain acceptable evidence of guilt. This conclusion is buttressed by the instruction quoted in the concluding paragraph of note 2 in my Brother STEWART's dissenting opinion, in which the trial court indicates that the confession might be disregarded by the jury not simply if the drug had the effect asserted by the petitioner's expert in response to a hypothetical question, but only if, *in addition,* the drug so affected the petitioner's consciousness that "he did not know what he was doing." The petitioner may have been fully aware of what he was doing in confessing and may have suffered no loss of memory, but that is not the issue. The crucial question, and the measure of evidentiary propriety under the Constitution, is whether the drug—whatever label was or was not affixed to it—so overbore the petitioner's will that he was unable to resist confessing. Whether or not he was conscious of what he was doing, the petitioner could, because of the drug, have been wholly unable to stop himself from admitting guilt.*

In the absence of contrary indications, I think we must recognize that the misconception of the constitutional standard evidenced by these instructions may well have infected the trial judge's ruling at the suppression hearing. The inference of error is not negatived by the remainder of the instructions, which permit disregard of the confession if induced by force, physical or mental, duress, or promise of reward. In the context of the instructions as a whole, these references to "voluntariness" do not meet the problems raised by the administration of the drug to the petitioner and do not vitiate the crucial inference that

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*The petitioner's initial resistance to admitting guilt, his sudden change in attitude, and the veritable flood of confessions succeeding immediately upon administration of the drug to him, see *ante,* pp. 306–307, all indicate the real possibility that his will was so overborne. Moreover, the reliability of a number of these confessions is seriously impaired. See *ibid.*

the trial judge viewed exclusion as dependent upon the presence of facts in addition to a drug-induced sterilization of the petitioner's will.

For the reasons contained in the opinion of the Court, and on the basis of what I believe to be the wholly fair inference that the trial court misconceived the proper constitutional measure of admissibility of the petitioner's confession, the lack of any indication that the trial court did utilize the correct test, and the state appellate court's apparent application of a similarly erroneous standard, I agree that a hearing must be held below.

Finally, the Court's opinion does not warrant my Brother STEWART's criticism as to the propriety or wisdom of articulating standards to govern the grant of evidentiary hearings in habeas corpus proceedings. The setting of certain standards is essential to disposition of this case and a definition of their scope and application is an appropriate exercise of this Court's adjudicatory obligations. Particularly when, as here, the Court is directing the federal judiciary as to its role in applying the historic remedy in a difficult and sensitive area involving large issues of federalism, the careful discharge of our function counsels that, "in order to preclude individualized enforcement of the Constitution in different parts of the Nation, [we] . . . lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts." *Brown* v. *Allen*, 344 U. S. 443, 501–502 (separate opinion of Mr. Justice Frankfurter).

MR. JUSTICE STEWART, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE join, dissenting.

The basis for my disagreement with the Court can perhaps best be explained if I define at the outset the several areas in which I am entirely in accord with the Court's

opinion. First, as to the underlying issue of constitutional law, I completely agree that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial. Secondly, I agree that the Court of Appeals in this case stated an erroneous standard when it said that "[o]n habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record. . . ." 276 F. 2d 324, 329. Thirdly, I agree that where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the *power* to receive evidence and try the facts anew.[1]

I differ with the Court's disposition of this case in two important respects. First, I strongly doubt the wisdom of using this case—or any other—as a vehicle for cataloguing in advance a set of standards which are inflexibly to compel district judges to grant evidentiary hearings in habeas corpus proceedings. Secondly, I think that a *de novo* evidentiary hearing is not required in the present case, even under the very standards which the Court's opinion elaborates.

I.

I have no quarrel with the Court's statement of the basic governing principle which should determine whether a hearing is to be had in a federal habeas corpus

[1] Indeed, the original version of 28 U. S. C. § 2243 directed the court to "proceed in a summary way to *determine the facts* of the case, *by hearing the testimony* and arguments, and thereupon to dispose of the party as law and justice require." See *Walker* v. *Johnston*, 312 U. S. 275, 283–284. (Emphasis added.) The statute was later revised so that it now provides that "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The Revisers' notes indicate that the change was one of "phraseology" and not substance.

Where the state court has reliably found facts relevant to any issue, the district judge in such a hearing should, of course, give appropriate deference to such findings. See *ante*, p. 318.

proceeding: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Ante*, p. 312. But the Court rightly says that "[i]t would be unwise to overly particularize this test," and I think that in attempting to erect detailed hearing standards for the myriad situations presented by federal habeas corpus applications, the Court disregards its own wise admonition.

The Court has done little more today than to supply new phrases—imprecise in scope and uncertain in meaning—for the habeas corpus vocabulary of District Court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.

More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case before us, and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date. See, *e. g.*, *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365, 368, n. 5; *Machinists Local* v. *Labor Board*, 362 U. S. 411, 415, n. 5. I regard these reasons as peculiarly persuasive in the present context. We should not try to hedge in with inflexible rules what is essentially an extraordinary writ, designed to do justice in extraordinary and often unpredictable situations.

## II.

Even accepting the Court's detailed hearing standards *in toto,* however, I cannot agree that any one of them requires the District Court to hold a new evidentiary hearing in the present case. And I think, putting these rigid formulations to one side, that accepted principles governing the fair and prompt administration of criminal justice within our federal system affirmatively counsel *against* a *de novo* federal court hearing in this case.

The Court refers to two specific defects which it feels compel a hearing in the District Court: the absence of "indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession" and the fact that it was not disclosed in the state hearing that "the substance injected into Townsend before he confessed has properties which may trigger statements in a legal sense involuntary." Since the lengthy extracts from the testimony and pleadings in the Court's opinion do not seem to me to bear on these issues, it becomes necessary to sketch the prior proceedings in this case to indicate why I think the Court is mistaken in concluding that a new hearing is required.

During the early morning hours of January 1, 1954, the petitioner was arrested by the Chicago police. He admitted having given himself an injection of heroin 90 minutes before his arrest. Within an hour of his arrest, he was questioned for 30 minutes about various crimes, all of which he denied having committed. He was not questioned again until that evening.

Shortly after the evening questioning began, the petitioner complained of stomach pains and requested a doctor. A police surgeon was summoned, and he administered an injection consisting of 2 cc.'s of a saline solution in which 1/230 grain of hyoscine hydrobromide and ⅛

grain of phenobarbital were dissolved. Slightly more than an hour later, the petitioner confessed to the murder of Boone. The following day, 15 hours after the police surgeon had administered the hyoscine, the petitioner initialed a copy of his previous night's statement in the offices of the State's Attorney General. At the coroner's hearing on January 4, the petitioner again confessed to the Boone killing.

### A. THE STANDARD OF FEDERAL LAW APPLIED BY THE STATE TRIAL COURT IN RULING UPON THE ADMISSIBILITY OF THE CONFESSION.

At the trial, the petitioner's lawyer objected to introduction of the confession on the ground that it was involuntary. In accordance with Illinois practice, the motion to suppress was argued before the judge in the absence of the jury. During this proceeding, the petitioner testified that the injection had produced a temporary state of amnesia, that he could not remember making any confession, and that various other physical effects were produced. The police officers present at the petitioner's questioning stated that no change in the petitioner's demeanor suggesting any loss of his mental faculties had taken place as a result of the injection. On the question of the possible effects of the injection administered to the petitioner, Dr. Mansfield, the police surgeon and a licensed physician, testified for the State that he had treated thousands of narcotics addicts suffering from withdrawal symptoms, that in about 50% of such cases he had used the same treatment administered to the petitioner, and that he could recall no case in his experience where his use of hyoscine had produced loss of memory. A doctor of pharmacology (who was not a licensed physician) testified on behalf of the petitioner, and in answer to a hypothetical question stated that a person in the petitioner's condition at the time of interrogation could have

been suffering amnesia and partial loss of consciousness as the result of the treatment which had been administered to relieve the narcotic withdrawal symptoms. On cross-examination, this witness revealed that he had never actually seen the effects of hyoscine on a human and admitted that he was unfamiliar with its use in treating drug addicts. It is evident that a finder of fact could with reason have accorded more credibility to the evidence offered by the prosecution than to that offered by the defense.

It is true, as the Court today says, that in overruling the motion to suppress the confession, the trial judge did not explicitly spell out the exclusionary standards he was applying. The instructions to the jury at the end of the case, however, although directed to the question of credibility—since that was the issue before the jury under Illinois procedure—were couched in terms of voluntariness, and they clearly established that the trial judge was aware of the correct constitutional standards to be applied.[2]

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[2] Among the instructions given were the following:

"There has been admitted into evidence a written confession alleged to have been made freely and voluntarily by the defendant.

"You are further instructed that a confession made freely and voluntarily by a person charged with a crime may be considered by you, but if you find from the evidence that any force, physically or mentally, has been exerted upon the defendant by those having the defendant in charge after his arrest in order to obtain a confession, or that those persons made any promises to reward him if he would make such a confession, then you may totally disregard such confession.

"You are further instructed that if you find from the evidence that the defendant was given drugs and that said drugs caused him to lose his memory and create a state of amnesia in the defendant during the questioning of this defendant by the police or State's Attorney and that the defendant was not able to control his answers or to assert his will by denying the crime charged, then you may totally disregard such confession.

"You are instructed that if you find from the evidence that any influence was used on the defendant which amounted to duress upon

Nothing in the record indicates that an incorrect standard was applied at the suppression hearing. Given these circumstances, I think it completely impermissible for us to assume that the trial judge did not apply "the proper standard of federal law in ruling upon the admissibility of the confession." Where, as here, a record is totally devoid of any indication that a state trial judge employed an erroneous constitutional standard, the presumption should surely be that the judge knew the law and correctly applied it. Certainly it is improper to presume that the trial judge did *not* know the law which the Constitution commands him to follow. Yet that is precisely the presumption which the Court makes in this case.

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his mind or body which caused him to make the confession, then you may totally disregard the confession.

. . . . .

"You are further instructed that if you believe from the evidence in this case that duress or influence either physically or mentally, was exerted upon the defendant which caused him to make the written confession which has been introduced into evidence, then you may further consider whether this influence was still in existence at the time the defendant appeared at the coroner's inquest and is alleged to have made a confession there.

"There has been introduced into evidence the testimony of a witness, who is in the category known as an 'Expert Witness,' who testified as to what influence or effect certain drugs had upon a hypothetical person.

"You are further instructed that you may take this testimony into consideration in determining whether the drugs alleged to have been administered to the defendant by Dr. Mansfield would have the same effect upon the defendant that the drug in the opinion of the 'Expert Witness' had upon the hypothetical person, and if you believe from all the evidence in this case that the drugs had the effect upon the defendant to cause his consciousness to be impaired to the extent that he did not know what he was doing while he was being questioned by police officers or the Assistant State's Attorney, then you may totally disregard any statement or confession that he is alleged to have made during the time such influence, if any, was exerted upon him."

B. DISCLOSURE OF THE "PROPERTIES" OF THE MEDICINE ADMINISTERED TO THE PETITIONER.

Much of the evidence which had been presented to the judge alone was subsequently brought before the jury by defense counsel in an attempt to diminish the weight to be given to the confession. Additional evidence was also adduced by the prosecution, including testimony by another licensed physician, who made clear that hyoscine was identical with scopolamine. The case was submitted to the jury under unexceptionable instructions,[3] and the petitioner was convicted and sentenced to death. The Illinois Supreme Court, after reviewing in detail the evidence bearing on the voluntariness of the confession, affirmed the conviction. 11 Ill. 2d 30, 141 N. E. 2d 729. This Court denied certiorari, 355 U. S. 850; rehearing denied, 355 U. S. 886.

The petitioner then instituted post-conviction proceedings in the state trial court. His claim in these proceedings was that the confession had been procured as a result of the administration of scopolamine, that the witnesses for the State were aware of the identity of scopolamine and hyoscine and had deliberately withheld the fact of this identity at trial, and that the petitioner had consequently not been afforded an opportunity to make clear the basis for his claim that his confession had been coerced. The trial court dismissed the petition, and the Supreme Court of Illinois affirmed. In an unpublished opinion, that court concluded as follows:

> "A study of our opinion on [the original appeal] discloses that all of the evidence with respect to the injection of hyoscine and phenobarbital was carefully considered by us in resolving the issue of the validity of petitioner's confession. (People vs.

[3] See footnote 2, *supra*.

> Townsend, 11 Ill. 2d, 30, 35, 44). Thus, it is clear that the issue of the effect of the drug on the confession was before us . . . . The only matter which was not presented then was the fact that hyoscine and scopolamine are identical. In an attempt to escape from the doctrine of *res judicata*, the present petition for a writ of error contends that this fact could not have been presented to us because it was unknown to petitioner and his counsel at the time. Assuming for the moment the truth of this statement, we are of the opinion that the mere fact that the drug which was administered to petitioner is known by two different names presents no constitutional issue. At the original trial there was extensive medical testimony as to the properties and effects of hyoscine. If hyoscine and scopolamine are, in fact, identical, the medical testimony as to these properties and effects would be the same, regardless of the name of the drug. In determining the effect of the drug on the validity of petitioner's confession, the vital issue was its nature and its effect, rather than its name. This issue was thoroughly presented, both in the trial court and in this Court. Furthermore, the claim by petitioner now that the State 'suppressed' this identity of hyoscine and scopolamine at the trial is destroyed by reference to the bill of exceptions from the original trial. A State medical witness, on cross-examination by petitioner's counsel stated: 'Scopolamine or hyoscine are the same.' "

Even under the detailed hearing requirements announced today by the Court, therefore, I think it is clear that the district judge had no choice but to conclude, on the basis of his examination of the full record of the state proceedings, that a new hearing on habeas corpus would

not be proper. For the record of the state proceedings clearly shows that the petitioner received a full and fair hearing as to the factual foundation for his constitutional claim—*i. e.*, as to the properties of the drug which had been administered to him and the circumstances surrounding his confession. A total of 3 medical experts and 17 lay witnesses testified. Their testimony was in conflict. The trial court determined upon this conflicting evidence that there was no factual basis for the petitioner's claim that his confession had been involuntary. There is nothing whatever in the record to support an inference that the trial court did not scrupulously apply a completely correct constitutional standard in determining that the confession was admissible.[4] The trial court's determination was fully reviewed by the Supreme Court of Illinois on appeal, and reviewed again in state post-conviction proceedings. To be sure, no witness at the trial used the phrase "truth serum"—a phrase which has no precise medical or scientific meaning. Yet I cannot but agree with the Supreme Court of Illinois that the mere fact that a drug may be known by more than one name hardly presents a constitutional issue.

Under our Constitution the State of Illinois has the power and duty to administer its own criminal justice. In carrying out that duty, Illinois must, as must each State, conform to the Due Process Clause of the Fourteenth Amendment. I think Illinois has clearly accorded the petitioner due process in this case. To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined in the courts of Illinois is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system, and to debase the Great Writ of Habeas Corpus.

I would affirm.

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[4] See pp. 330–331, *supra*.

# GIDEON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 155. Argued January 15, 1963.—Decided March 18, 1963.

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him; but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defense about as well as could be expected of a layman; but he was convicted and sentenced to imprisonment. Subsequently, he applied to the State Supreme Court for a writ of habeas corpus, on the ground that his conviction violated his rights under the Federal Constitution. The State Supreme Court denied all relief. *Held:* The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment. *Betts* v. *Brady*, 316 U. S. 455, overruled. Pp. 336–345.

Reversed and cause remanded.

*Abe Fortas*, by appointment of the Court, 370 U. S. 932, argued the cause for petitioner. With him on the brief were *Abe Krash* and *Ralph Temple*.

*Bruce R. Jacob*, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Richard W. Ervin*, Attorney General, and *A. G. Spicola, Jr.*, Assistant Attorney General.

*J. Lee Rankin*, by special leave of Court, argued the cause for the American Civil Liberties Union et al., as *amici curiae*, urging reversal. With him on the brief were *Norman Dorsen, John Dwight Evans, Jr., Melvin L. Wulf, Richard J. Medalie, Howard W. Dixon* and *Richard Yale Feder*.

*George D. Mentz*, Assistant Attorney General of Alabama, argued the cause for the State of Alabama, as

*amicus curiae,* urging affirmance. With him on the brief were *MacDonald Gallion,* Attorney General of Alabama, *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General of North Carolina.

A brief for the state governments of twenty-two States and Commonwealths, as *amici curiae,* urging reversal, was filed by *Edward J. McCormack, Jr.,* Attorney General of Massachusetts, *Walter F. Mondale,* Attorney General of Minnesota, *Duke W. Dunbar,* Attorney General of Colorado, *Albert L. Coles,* Attorney General of Connecticut, *Eugene Cook,* Attorney General of Georgia, *Shiro Kashiwa,* Attorney General of Hawaii, *Frank Benson,* Attorney General of Idaho, *William G. Clark,* Attorney General of Illinois, *Evan L. Hultman,* Attorney General of Iowa, *John B. Breckinridge,* Attorney General of Kentucky, *Frank E. Hancock,* Attorney General of Maine, *Frank J. Kelley,* Attorney General of Michigan, *Thomas F. Eagleton,* Attorney General of Missouri, *Charles E. Springer,* Attorney General of Nevada, *Mark McElroy,* Attorney General of Ohio, *Leslie R. Burgum,* Attorney General of North Dakota, *Robert Y. Thornton,* Attorney General of Oregon, *J. Joseph Nugent,* Attorney General of Rhode Island, *A. C. Miller,* Attorney General of South Dakota, *John J. O'Connell,* Attorney General of Washington, *C. Donald Robertson,* Attorney General of West Virginia, and *George N. Hayes,* Attorney General of Alaska.

*Robert Y. Thornton,* Attorney General of Oregon, and *Harold W. Adams,* Assistant Attorney General, filed a separate brief for the State of Oregon, as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under

Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

> "The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
>
> "The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." [1] Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when *Betts* v. *Brady,* 316 U. S. 455, was decided by a divided

[1] Later in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, "I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights."

Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts.[2] To give this problem another review here, we granted certiorari. 370 U. S. 908. Since Gideon was proceeding *in forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, be reconsidered?"

I.

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison.

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[2] Of the many such cases to reach this Court, recent examples are *Carnley* v. *Cochran*, 369 U. S. 506 (1962); *Hudson* v. *North Carolina*, 363 U. S. 697 (1960); *Moore* v. *Michigan*, 355 U. S. 155 (1957). Illustrative cases in the state courts are *Artrip* v. *State*, 136 So. 2d 574 (Ct. App. Ala. 1962); *Shaffer* v. *Warden*, 211 Md. 635, 126 A. 2d 573 (1956). For examples of commentary, see Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 De Paul L. Rev. 213 (1959); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. of Chi. L. Rev. 1 (1962); The Right to Counsel, 45 Minn. L. Rev. 693 (1961).

Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:

> "Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." 316 U. S., at 462.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts* v. *Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that *Betts* v. *Brady* should be overruled.

## II.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have con-

strued this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.[3] Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." 316 U. S., at 465. In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered "[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date." 316 U. S., at 465. On the basis of this historical data the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." 316 U. S., at 471. It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

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[3] *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell* v. *Alabama,* 287 U. S. 45 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in *Hurtado* v. *California,* 110 U. S. 516 (1884), the Fourteenth Amendment "embraced" those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " even though they had been "specifically dealt with in another part of the federal Constitution." 287 U. S., at 67. In many cases other than *Powell* and *Betts,* this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.[4] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that

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[4] *E. g., Gitlow* v. *New York,* 268 U. S. 652, 666 (1925) (speech and press); *Lovell* v. *City of Griffin,* 303 U. S. 444, 450 (1938) (speech and press); *Staub* v. *City of Baxley,* 355 U. S. 313, 321 (1958) (speech); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936) (press); *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940) (religion); *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (1937) (assembly); *Shelton* v. *Tucker,* 364 U. S. 479, 486, 488 (1960) (association); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 296 (1961) (association); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) (speech, assembly, petition for redress of grievances).

private property shall not be taken for public use without just compensation,[5] the Fourth Amendment's prohibition of unreasonable searches and seizures,[6] and the Eighth's ban on cruel and unusual punishment.[7] On the other hand, this Court in *Palko* v. *Connecticut,* 302 U. S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states" and that guarantees "in their origin . . . effective against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption." 302 U. S., at 324–325, 326.

We accept *Betts* v. *Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts* v. *Brady,* this Court, after full consideration of all the historical data examined in *Betts,* had unequivocally declared that "the right to the aid of

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[5] *E. g., Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 235–241 (1897); *Smyth* v. *Ames,* 169 U. S. 466, 522–526 (1898).

[6] *E. g., Wolf* v. *Colorado,* 338 U. S. 25, 27–28 (1949); *Elkins* v. *United States,* 364 U. S. 206, 213 (1960); *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961).

[7] *Robinson* v. *California,* 370 U. S. 660, 666 (1962).

counsel is of this fundamental character." *Powell* v. *Alabama,* 287 U. S. 45, 68 (1932). While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243–244 (1936).

And again in 1938 this Court said:

> "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' " *Johnson* v. *Zerbst,* 304 U. S. 458, 462 (1938). To the same effect, see *Avery* v. *Alabama,* 308 U. S. 444 (1940), and *Smith* v. *O'Grady,* 312 U. S. 329 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the *Betts* Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument . . . ." 316 U. S., at 462–463. The fact is that in deciding as it did—that "appointment of counsel is not a fundamental right,

essential to a fair trial"—the Court in *Betts* v. *Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell* v. *Alabama:*

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

> heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U. S., at 68–69.

The Court in *Betts* v. *Brady* departed from the sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested. Florida, supported by two other States, has asked that *Betts* v. *Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

*Reversed.*

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical résumé of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.

Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil* v. *Vermont*, 144 U. S. 323, 362–363, 370–371, as did Justices BLACK, DOUGLAS, Murphy and Rutledge in *Adamson* v. *California*, 332 U. S. 46, 71–72, 124. And see *Poe* v. *Ullman*, 367 U. S. 497, 515–522 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases*, 16 Wall. 36, 118–119, 122, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in *Walker* v. *Sauvinet*, 92 U. S. 90, 92.[1] Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government.[2] Mr. Justice Jackson shared that view.[3]

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[1] Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. See *Slaughter-House Cases*, *supra*, at 118–119; *O'Neil* v. *Vermont*, *supra*, at 363. Justices Harlan and Brewer accepted the same theory in the *O'Neil* case (see *id.*, at 370–371), though Justice Harlan indicated that all "persons," not merely "citizens," were given this protection. *Ibid.* In *Twining* v. *New Jersey*, 211 U. S. 78, 117, Justice Harlan's position was made clear:

"In my judgment, immunity from self-incrimination is protected against hostile state action, not only by . . . [the Privileges and Immunities Clause], but [also] by . . . [the Due Process Clause]."

Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in *Maxwell* v. *Dow*, 176 U. S. 581.

[2] See *Roth* v. *United States*, 354 U. S. 476, 501, 506; *Smith* v. *California*, 361 U. S. 147, 169.

[3] *Beauharnais* v. *Illinois*, 343 U. S. 250, 288. Cf. the opinions of Justices Holmes and Brandeis in *Gitlow* v. *New York*, 268 U. S. 652, 672, and *Whitney* v. *California*, 274 U. S. 357, 372.

But that view has not prevailed [4] and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

MR. JUSTICE CLARK, concurring in the result.

In *Bute* v. *Illinois,* 333 U. S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel but stated that "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." *Id.,* at 674. Prior to that case I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment.[1] At the next Term of the Court Mr. Justice Reed revealed that the Court was divided as to noncapital cases but that "the due process clause . . . requires counsel for all persons charged with serious crimes . . . ." *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441 (1948). Finally, in *Hamilton* v. *Alabama,* 368 U. S. 52 (1961), we said that "[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.,* at 55.

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[4] The cases are collected by MR. JUSTICE BLACK in *Speiser* v. *Randall,* 357 U. S. 513, 530. And see, *Eaton* v. *Price,* 364 U. S. 263, 274–276.

[1] It might, however, be said that there is such an implication in *Avery* v. *Alabama,* 308 U. S. 444 (1940), a capital case in which counsel had been appointed but in which the petitioner claimed a denial of "effective" assistance. The Court in affirming noted that "[h]ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of asssistance of counsel would have required reversal of his conviction." *Id.,* at 445. No "special circumstances" were recited by the Court, but in citing *Powell* v. *Alabama,* 287 U. S. 45 (1932), as authority for its dictum it appears that the Court did not rely solely on the capital nature of the offense.

That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear, both from the language of the Amendment and from this Court's interpretation. See *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). It is equally clear from the above cases, all decided after *Betts* v. *Brady*, 316 U. S. 455 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, *Reid* v. *Covert*, 354 U. S. 1 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today,[2] as we noted that:

> "Obviously Fourteenth Amendment cases dealing with state action have no application here, but if

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[2] Portents of today's decision may be found as well in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). In *Griffin*, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In *Ferguson* we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that "[o]ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel." 365 U. S., at 596.

> they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . . would be as invalid under those cases as it would be in cases of a capital nature." 361 U. S., at 246–247.

I must conclude here, as in *Kinsella, supra,* that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted [3]—or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

MR. JUSTICE HARLAN, concurring.

I agree that *Betts* v. *Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts* v. *Brady* represented "an abrupt break with its own well-considered precedents." *Ante,* p. 344. In 1932, in *Powell* v. *Alabama,* 287 U. S. 45, a capital case, this Court declared that under the particular facts there presented—"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and above all that they stood in deadly peril of their lives" (287 U. S., at 71)—the state court had a duty to assign counsel for

[3] See, *e. g.,* Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188–189 (1962).

the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, see 287 U. S., at 52, 57–58, 71, and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided *Betts* v. *Brady,* it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see *Johnson* v. *Zerbst,* 304 U. S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell* v. *Alabama,* was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts,* however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the *Betts* decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases.[1] Such dicta continued to appear in subsequent decisions,[2] and any lingering doubts were finally eliminated by the holding of *Hamilton* v. *Alabama,* 368 U. S. 52.

In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts,* there were cases in which the Court

[1] *Avery* v. *Alabama,* 308 U. S. 444, 445.

[2] *E. g., Bute* v. *Illinois,* 333 U. S. 640, 674; *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441.

found special circumstances to be lacking, but usually by a sharply divided vote.[3] However, no such decision has been cited to us, and I have found none, after *Quicksall* v. *Michigan*, 339 U. S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty.[4] The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts* v. *Brady* rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights.[5] To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to *all* criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

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[3] *E. g., Foster* v. *Illinois*, 332 U. S. 134; *Bute* v. *Illinois*, 333 U. S. 640; *Gryger* v. *Burke*, 334 U. S. 728.

[4] *E. g., Williams* v. *Kaiser*, 323 U. S. 471; *Hudson* v. *North Carolina*, 363 U. S. 697; *Chewning* v. *Cunningham*, 368 U. S. 443.

[5] See, *e. g., Commonwealth ex rel. Simon* v. *Maroney*, 405 Pa. 562, 176 A. 2d 94 (1961); *Shaffer* v. *Warden*, 211 Md. 635, 126 A. 2d 573 (1956); *Henderson* v. *Bannan*, 256 F. 2d 363 (C. A. 6th Cir. 1958).

In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. . When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" [6] and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. *Roth* v. *United States,* 354 U. S. 476, 496–508 (separate opinion of this writer). In what is done today I do not understand the Court to depart from the principles laid down in *Palko* v. *Connecticut,* 302 U. S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

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[6] *Palko* v. *Connecticut,* 302 U. S. 319, 325.

# DOUGLAS ET AL. *v.* CALIFORNIA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 34. Argued April 17, 1962.—Restored to the calendar for reargument June 25, 1962.—Reargued January 16, 1963.—Decided March 18, 1963.

In a California State Court, petitioners were tried jointly, convicted of 13 felonies and sentenced to imprisonment. Exercising their only right to appeal as of right, they appealed to an intermediate Court of Appeals, and, being indigent, applied to it for appointment of counsel to assist them on appeal. In accordance with a state rule of criminal procedure, that Court made an *ex parte* examination of the record, determined that appointment of counsel for petitioners would not be "of advantage to the defendant or helpful to the appellate court" and denied appointment of counsel. Their appeal was heard without assistance of counsel and their convictions were affirmed. The State Supreme Court denied a discretionary review. *Held:* Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel in a state criminal case, there has been a discrimination between the rich and the poor which violates the Fourteenth Amendment. Pp. 353–358.

187 Cal. App. 2d 802, 10 Cal. Rptr. 188, judgment vacated and cause remanded.

*Marvin M. Mitchelson* and *Burton Marks* reargued the cause for petitioners. With them on the briefs were *A. L. Wirin, Fred Okrand* and *Nanette Dembitz.*

*William E. James,* Assistant Attorney General of California, and *Jack E. Goertzen,* Deputy Attorney General, argued the cause for respondent. With them on the briefs was *Stanley Mosk,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners, Bennie Will Meyes and William Douglas, were jointly tried and convicted in a California court on an information charging them with 13 felonies. A single

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public defender was appointed to represent them. At the commencement of the trial, the defender moved for a continuance, stating that the case was very complicated, that he was not as prepared as he felt he should be because he was handling a different defense every day, and that there was a conflict of interest between the petitioners requiring the appointment of separate counsel for each of them. This motion was denied. Thereafter, petitioners dismissed the defender, claiming he was unprepared, and again renewed motions for separate counsel and for a continuance. These motions also were denied, and petitioners were ultimately convicted by a jury of all 13 felonies, which included robbery, assault with a deadly weapon, and assault with intent to commit murder. Both were given prison terms. Both appealed as of right to the California District Court of Appeal. That court affirmed their convictions. 187 Cal. App. 2d 802, 10 Cal. Rptr. 188. Both Meyes and Douglas then petitioned for further discretionary review in the California Supreme Court, but their petitions were denied without a hearing.[1] 187 Cal. App. 2d, at 813, 10 Cal. Rptr., at 195. We granted certiorari. 368 U. S. 815.

Although several questions are presented in the petition for certiorari, we address ourselves to only one of them. The record shows that petitioners requested, and were denied, the assistance of counsel on appeal, even though it plainly appeared they were indigents. In denying petitioners' requests, the California District Court of Appeal stated that it had "gone through" the record

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[1] While the notation of a denial of hearing by the California Supreme Court indicates that only Meyes petitioned that Court for a hearing, and is silent as to Douglas' attempts at further review, the record shows that the petition for review was expressly filed on behalf of Douglas as well. Both Meyes and Douglas, therefore, have exhausted their state remedies and both cases are properly before us. 28 U. S. C. § 1257 (3).

and had come to the conclusion that "no good whatever could be served by appointment of counsel." 187 Cal. App. 2d 802, 812, 10 Cal. Rptr. 188, 195. The District Court of Appeal was acting in accordance with a California rule of criminal procedure which provides that state appellate courts, upon the request of an indigent for counsel, may make "an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. . . . After such investigation, appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court." *People* v. *Hyde*, 51 Cal. 2d 152, 154, 331 P. 2d 42, 43.

We agree, however, with Justice Traynor of the California Supreme Court, who said that the "[d]enial of counsel on appeal [to an indigent] would seem to be a discrimination at least as invidious as that condemned in *Griffin* v. *Illinois* . . . ." *People* v. *Brown*, 55 Cal. 2d 64, 71, 357 P. 2d 1072, 1076 (concurring opinion). In *Griffin* v. *Illinois*, 351 U. S. 12, we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There, as in *Draper* v. *Washington, post*, p. 487, the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has." *Griffin* v. *Illinois, supra*, at p. 19.

In spite of California's forward treatment of indigents, under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges

upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required.

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the *first appeal,* granted as a matter of right to rich and poor alike (Cal. Penal Code §§ 1235, 1237), from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction (see Cal. Const., Art. VI, § 4c; Cal. Rules on Appeal, Rules 28, 29), or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348

U. S. 483, 489; *Griffin* v. *Illinois, supra,* p. 18. Absolute equality is not required; lines can be and are drawn and we often sustain them. See *Tigner* v. *Texas,* 310 U. S. 141; *Goesaert* v. *Cleary,* 335 U. S. 464. But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. In the federal courts, on the other hand, an indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good faith. *Johnson* v. *United States,* 352 U. S. 565. The federal courts must honor his request for counsel regardless of what they think the merits of the case may be; and "representation in the role of an advocate is required." *Ellis* v. *United States,* 356 U. S. 674, 675.[2] In California, however, once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking

[2] "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge* v. *United States,* 369 U. S. 438, 449.

that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

We vacate the judgment of the District Court of Appeal and remand the case to that court for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE CLARK, dissenting.

I adhere to my vote in *Griffin* v. *Illinois,* 351 U. S. 12 (1956), but, as I have always understood that case, it does not control here. It had to do with the State's obligation to furnish a record to an indigent on appeal. There we took pains to point out that the State was free to "find other means of affording adequate and effective appellate review to indigent defendants." *Id.,* at 20. Here California has done just that in its procedure for furnishing attorneys for indigents on appeal. We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous. Statistics of this Court show that over 96% of the petitions filed here are of this variety.[1] California, in the light of a like experience, has provided that upon the filing of an application for the appointment of counsel the District Court of Appeal shall make "an independent investigation of the record

[1] Statistics from the office of the Clerk of this Court reveal that in the 1961 Term only 38 of 1,093 *in forma pauperis* petitions for certiorari were granted (3.4%). Of 44 *in forma pauperis* appeals, all but one were summarily dismissed (2.3%).

and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed." *People* v. *Hyde,* 51 Cal. 2d 152, 154, 331 P. 2d 42, 43 (1958). California's courts did that here and after examining the record certified that such an appointment would be neither advantageous to the petitioners nor helpful to the court. It, therefore, refused to go through the useless gesture of appointing an attorney. In my view neither the Equal Protection Clause nor the Due Process Clause requires more. I cannot understand why the Court says that this procedure afforded petitioners "a meaningless ritual." To appoint an attorney would not only have been utter extravagance and a waste of the State's funds but as surely "meaningless" to petitioners.

With this new fetish for indigency the Court piles an intolerable burden on the State's judicial machinery. Indeed, if the Court is correct it may be that we should first clean up our own house. We have afforded indigent litigants much less protection than has California. Last Term we received over 1,200 *in forma pauperis* applications in none of which had we appointed attorneys or required a record. Some were appeals of right. Still we denied the petitions or dismissed the appeals on the moving papers alone. At the same time we had hundreds of paid cases in which we permitted petitions or appeals to be filed with not only records but briefs by counsel, after which they were disposed of in due course. On the other hand, California furnishes the indigent a complete record and if counsel is requested requires its appellate courts either to (1) appoint counsel or (2) make an independent investigation of that record and determine whether it would be of advantage to the defendant or helpful to the court to have counsel appointed. Unlike *Lane* v. *Brown,* decided today, *post,* p. 477, decision in these matters is not placed in the unreviewable discretion

of the Public Defender or appointed counsel but is made by the appellate court itself.[2]

California's concern for the rights of indigents is clearly revealed in *People* v. *Hyde, supra.* There, although the Public Defender had not undertaken the prosecution of the appeal, the District Court of Appeal nevertheless referred the application for counsel and the record to the Los Angeles Bar Association. One of its members reviewed these papers, after which he certified that no meritorious ground for appeal was disclosed. Despite this the California District Court of Appeal made its own independent examination of the record.

There is an old adage which my good Mother used to quote to me, *i. e.*, "People who live in glass houses had best not throw stones." I dissent.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

In holding that an indigent has an absolute right to appointed counsel on appeal of a state criminal conviction, the Court appears to rely both on the Equal Pro-

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[2] The crucial question here is, of course, the *effectiveness* of the appellate review which was unquestionably provided. In *Lane* v. *Brown, post,* p. 477, the unreviewable decision of the Public Defender precluded any appellate review under Indiana law. As to the fairness and effectiveness of the appellate review here as compared with *Griffin* v. *Illinois,* 351 U. S. 12 (1956), the State conceded the necessity of a transcript for adequate review of the alleged trial errors in that case. *Id.,* at 16. Compare the statement of the District Court of Appeal in affirming here: "Further, the briefs filed by Meyes [which Douglas adopted] conform to the rules in all respects, are well written, present all possible points clearly and ably with abundant citation of pertinent authorities, and were no doubt prepared by one well versed in criminal law and procedure and in brief writing. There was no prejudicial error in not appointing counsel for defendants on the appeal." 187 Cal. App. 2d 802, 812, 10 Cal. Rptr. 188, 195.

tection Clause and on the guarantees of fair procedure inherent in the Due Process Clause of the Fourteenth Amendment, with obvious emphasis on "equal protection." In my view the Equal Protection Clause is not apposite, and its application to cases like the present one can lead only to mischievous results. This case should be judged solely under the Due Process Clause, and I do not believe that the California procedure violates that provision.

### EQUAL PROTECTION.

To approach the present problem in terms of the Equal Protection Clause is, I submit, but to substitute resounding phrases for analysis. I dissented from this approach in *Griffin* v. *Illinois*, 351 U. S. 12, 29, 34–36,[1] and I am constrained to dissent from the implicit extension of the equal protection approach here—to a case in which the State denies no one an appeal, but seeks only to keep within reasonable bounds the instances in which appellate counsel will be assigned to indigents.

The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.

Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a

[1] The majority in *Griffin* appeared to rely, as here, on a blend of the Equal Protection and Due Process Clauses in arriving at the result. So far as the result in that case rested on due process grounds, I fully accept the authority of *Griffin*.

uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich. And surely, there would be no basis for attacking a state law which provided benefits for the needy simply because those benefits fell short of the goods or services that others could purchase for themselves.

Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." [2] To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

Thus it should be apparent that the present case, as with *Draper* v. *Washington, post,* p. 487, and *Lane* v. *Brown, post,* p. 477, both decided today, is not one properly regarded as arising under this clause. California does not discriminate between rich and poor in having a uniform policy permitting everyone to appeal and to retain counsel, and in having a separate rule dealing *only* with the standards for the appointment of counsel for those unable to retain their own attorneys. The sole classification established by this rule is between those cases that are believed to have merit and those regarded as frivolous. And, of course, no matter how far the state rule might go

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[2] *Griffin* v. *Illinois, supra,* at 34 (dissenting opinion of this writer).

in providing counsel for indigents, it could never be expected to satisfy an affirmative duty—if one existed—to place the poor on the same level as those who can afford the best legal talent available.

Parenthetically, it should be noted that if the present problem may be viewed as one of equal protection, so may the question of the right to appointed counsel at trial, and the Court's analysis of that right in *Gideon* v. *Wainwright, ante,* p. 335, decided today, is wholly unnecessary. The short way to dispose of *Gideon* v. *Wainwright,* in other words, would be simply to say that the State deprives the indigent of equal protection whenever it fails to furnish him with legal services, and perhaps with other services as well, equivalent to those that the affluent defendant can obtain.

The real question in this case, I submit, and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure guaranteed by the Due Process Clause. Of course, in considering this question, it must not be lost sight of that the State's responsibility under the Due Process Clause is to provide justice for all. Refusal to furnish criminal indigents with some things that others can afford may fall short of constitutional standards of fairness. The problem before us is whether this is such a case.

## DUE PROCESS.

It bears reiteration that California's procedure of screening its criminal appeals to determine whether or not counsel ought to be appointed denies to no one the right to appeal. This is not a case, like *Burns* v. *Ohio,* 360 U. S. 252, in which a court rule or statute bars all consideration of the merits of an appeal unless docketing fees are prepaid. Nor is it like *Griffin* v. *Illinois, supra,* in which the State conceded that "petitioners needed a transcript

in order to get adequate appellate review of their alleged trial errors." 351 U. S., at 16. Here it is *this* Court which finds, notwithstanding California's assertions to the contrary, that as a matter of constitutional law "adequate appellate review" is impossible unless counsel has been appointed. And while *Griffin* left it open to the States to devise "other means of affording adequate and effective appellate review to indigent defendants," 351 U. S., at 20, the present decision establishes what is seemingly an absolute rule under which the State may be left without any means of protecting itself against the employment of counsel in frivolous appeals.[3]

It was precisely towards providing adequate appellate review—as part of what the Court concedes to be "California's forward treatment of indigents"—that the State formulated the system which the Court today strikes down. That system requires the state appellate courts to appoint counsel on appeal for any indigent defendant except "if in their judgment such appointment would be of no value to either the defendant or the court." *People* v. *Hyde*, 51 Cal. 2d 152, 154, 331 P. 2d 42, 43. This judgment can be reached only after an independent investigation of the trial record by the reviewing court. And even if counsel is denied, a full appeal on the merits is accorded to the indigent appellant, together with a statement of the reasons why counsel was not assigned. There is nothing in the present case, or in any other case that has been cited to us, to indicate that the system has resulted in injustice. Quite the contrary, there is every reason to believe that California appellate courts have made a painstaking effort to apply the rule fairly and to live up to the State Supreme Court's mandate. See, *e. g.*, the dis-

[3] California law provides that if counsel is appointed on appeal, the court shall fix a reasonable fee to be paid by the State. California Penal Code § 1241. It is of course clear that this Court may not require the State to compel its attorneys to donate their services.

cussion in *People* v. *Vigil*, 189 Cal. App. 2d 478, 480–482, 11 Cal. Rptr. 319, 321–322.

We have today held that in a case such as the one before us, there is an absolute right to the services of counsel at trial. *Gideon* v. *Wainwright*, *ante*, p. 335. But the appellate procedures involved here stand on an entirely different constitutional footing. *First*, appellate review is in itself not required by the Fourteenth Amendment, *McKane* v. *Durston*, 153 U. S. 684; see *Griffin* v. *Illinois*, *supra*, at 18, and thus the question presented is the narrow one whether the State's rules with respect to the appointment of counsel are so arbitrary or unreasonable, *in the context of the particular appellate procedure that it has established*, as to require their invalidation. *Second*, the kinds of questions that may arise on appeal are circumscribed by the record of the proceedings that led to the conviction; they do not encompass the large variety of tactical and strategic problems that must be resolved at the trial. *Third*, as California applies its rule, the indigent appellant receives the benefit of expert and conscientious legal appraisal of the merits of his case on the basis of the trial record, and whether or not he is assigned counsel, is guaranteed full consideration of his appeal. It would be painting with too broad a brush to conclude that under these circumstances an appeal is just like a trial.

What the Court finds constitutionally offensive in California's procedure bears a striking resemblance to the rules of this Court and many state courts of last resort on petitions for certiorari or for leave to appeal filed by indigent defendants *pro se*. Under the practice of this Court, only if it appears from the petition for certiorari that a case merits review is leave to proceed *in forma pauperis* granted, the case transferred to the Appellate Docket, and counsel appointed. Since our review is generally discretionary, and since we are often not even given the benefit of a record in the proceedings below, the dis-

advantages to the indigent petitioner might be regarded as more substantial than in California. But as conscientiously committed as this Court is to the great principle of "Equal Justice Under Law," it has never deemed itself constitutionally required to appoint counsel to assist in the preparation of each of the more than 1,000 *pro se* petitions for certiorari currently being filed each Term. We should know from our own experience that appellate courts generally go out of their way to give fair consideration to those who are unrepresented.

The Court distinguishes our review from the present case on the grounds that the California rule relates to "the *first appeal,* granted as a matter of right." *Ante,* p. 356. But I fail to see the significance of this difference. Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review. Cf. *Lane* v. *Brown, post,* p. 477. Nor can it well be suggested that having appointed counsel is more necessary to the fair administration of justice in an initial appeal taken as a matter of right, which the reviewing court on the full record has already determined to be frivolous, than in a petition asking a higher appellate court to exercise its discretion to consider what may be a substantial constitutional claim.

Further, there is no indication in this record, or in the state cases cited to us, that the California procedure differs in any material respect from the screening of appeals in federal criminal cases that is prescribed by 28 U. S. C. § 1915. As recently as last Term, in *Coppedge* v. *United States,* 369 U. S. 438, we had occasion to pass upon the application of this statute. Although that decision established stringent restrictions on the power of federal courts to reject an application for leave to appeal *in forma pauperis,* it nonetheless recognized that the federal courts could prevent the needless expenditure of public funds by summarily disposing of frivolous appeals. Indeed in some

respects, California has outdone the federal system, since it provides a transcript and an appeal on the merits in *all* cases, no matter how frivolous.

I cannot agree that the Constitution prohibits a State, in seeking to redress economic imbalances at its bar of justice and to provide indigents with full review, from taking reasonable steps to guard against needless expense. This is all that California has done. Accordingly, I would affirm the state judgment.[4]

[4] Petitioners also contend that they were denied the effective assistance of counsel at trial. This claim, in my view, is without merit. A reading of the record leaves little doubt that petitioners' dismissal of their appointed counsel and their efforts to obtain a continuance were designed to delay the proceedings and, in all likelihood, to manufacture an appealable issue. Moreover, the trial court acted well within constitutional bounds in denying the claim that there was a conflict of interest between Douglas and Meyes that required a separate appointed attorney for each.

# GRAY, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL. *v.* SANDERS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 112. Argued January 17, 1963.—Decided March 18, 1963.

Appellee, a qualified voter in primary and general elections in Fulton county, Georgia, sued in a Federal District Court to restrain appellants, the Secretary of State and officials of the State Democratic Executive Committee, from using Georgia's county-unit system as a basis for counting votes in a Democratic primary election for the nomination of a United States Senator and statewide officers—which was practically equivalent to election. Such primary elections are governed by a Georgia statute, which was amended in 1962 so as to allocate unit votes to counties as follows: Counties with populations not exceeding 15,000, two units; an additional unit for the next 5,000 persons; an additional unit for the next 10,000; an additional unit for each of the next two brackets of 15,000; and, thereafter, two more units for each increase of 30,000. All candidates for statewide office were required to receive a majority of the county-unit votes to be entitled to nomination in the first primary. The practical effect of this system is that the vote of each citizen counts for less and less as the population of his county increases, and a combination of the units from the counties having the smallest population gives counties having one-third of the total population of the State a clear majority of county votes. *Held:*

1. Since the constitutionality of a state statute was involved and the question was a substantial one, a three-judge court was properly convened to hear this case, as required under 28 U. S. C. § 2281. P. 370.

2. State regulation of these primary elections makes the election process state action within the meaning of the Fourteenth Amendment. Pp. 374–375.

3. Appellee, like any person whose right to vote is impaired, had standing to sue. P. 375.

4. The case is not moot by reason of the fact that the Democratic Committee voted to hold the 1962 primary election on a popular-vote basis, since the 1962 Act remains in force and it would govern future elections if the complaint were dismissed. Pp. 375–376.

5. The use of this election system in a statewide election violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 376–381.

(a) The District Court correctly held that the county-unit system, as applied in a statewide election, violates the Equal Protection Clause of the Fourteenth Amendment; but it erred in framing its injunction so that a county-unit system might be used in weighting the votes in a statewide election, if the system showed no greater disparity against a county than exists against any State in the conduct of national elections. Pp. 373–374, 376–379.

(b) The Equal Protection Clause requires that, once a geographical unit for which a representative is to be chosen is designated, all who participate in the election must have an equal vote—whatever their race; whatever their sex; whatever their occupation; whatever their income and wherever their home may be in that geographical unit. Pp. 379–380.

(c) The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as an allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. Pp. 380–381.

(d) The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote. P. 381.

203 F. Supp. 158, judgment vacated and case remanded.

*B. D. Murphy* and *E. Freeman Leverett,* Deputy Assistant Attorneys General of Georgia, argued the cause for appellants. With them on the brief were *Eugene Cook,* Attorney General, and *Lamar W. Sizemore.*

*Morris B. Abram* argued the cause for appellee. With him on the brief were *Herman Heyman* and *Robert E. Hicks.*

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*Attorney General Kennedy,* by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging affirmance. On the brief were *Solicitor General Cox, Assistant Attorney General Marshall, Bruce J. Terris, Harold H. Greene, David Rubin* and *Howard A. Glickstein.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

I.

This suit was instituted by appellee, who is qualified to vote in primary and general elections in Fulton County, Georgia, to restrain appellants from using Georgia's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States Senator and statewide officers, and for declaratory relief. Appellants are the Chairman and Secretary of the Georgia State Democratic Executive Committee, and the Secretary of State of Georgia. Appellee alleges that the use of the county unit system in counting, tabulating, consolidating, and certifying votes cast in primary elections for statewide offices violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and the Seventeenth Amendment. As the constitutionality of a state statute was involved and the question was a substantial one, a three-judge court was properly convened. See 28 U. S. C. § 2281; *United States* v. *Georgia Public Service Comm'n,* 371 U. S. 285.

Appellants moved to dismiss; and they also filed an answer denying that the county unit system was unconstitutional and alleging that it was designed "to achieve a reasonable balance as between urban and rural electoral power."

Under Georgia law each county is given a specified number of representatives in the lower House of the Gen-

eral Assembly.[1] This county unit system at the time this suit was filed was employed as follows in statewide primaries: [2] (1) Candidates for nominations who received the highest number of popular votes in a county were considered to have carried the county and to be entitled to two votes for each representative to which the county is entitled in the lower House of the General Assembly; (2) the majority of the county unit vote nominated a United States Senator and Governor; the plurality of the county unit vote nominated the others.

Appellee asserted that the total population of Georgia in 1960 was 3,943,116; that the population of Fulton County, where he resides, was 556,326; that the residents of Fulton County comprised 14.11% of Georgia's total population; but that, under the county unit system, the six unit votes of Fulton County constituted 1.46% of the total of 410 unit votes, or one-tenth of Fulton County's percentage of statewide population. The complaint further alleged that Echols County, the least populous county in Georgia, had a population in 1960 of 1,876, or .05% of the State's population, but the unit vote of Echols County was .48% of the total unit vote of all counties in Georgia, or 10 times Echols County's statewide percentage of population. One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County.

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[1] Ga. Const., 1945, Art. III, § III, ¶ I:

"The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each."

[2] Ga. Code Ann., §§ 34–3212, 34–3213 (1936).

On the same day as the hearing in the District Court, Georgia amended the statutes challenged in the complaint. This amendment [3] modified the county unit system by allocating units to counties in accordance with a "bracket system" instead of doubling the number of representatives of each county in the lower House of the Georgia Assembly. Counties with from 0 to 15,000 people were allotted two units; an additional one unit was allotted for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons. Under the amended Act, all candidates for statewide office (not merely for Senator and Governor as under the earlier Act) are required to receive a majority of the county unit votes to be entitled to nomination in the first primary. In addition, in order to be nominated in the first primary, a candidate has to receive a majority of the popular votes unless there are only two candidates for the nomination and each receives an equal number of unit votes, in which event the candidate with the popular majority wins. If no candidate receives both a majority of the unit votes and a majority of the popular votes, a second run-off primary is required between the candidate receiving the highest number of unit votes and the candidate receiving the highest number of popular votes. In the second primary, the candidate receiving the highest number of unit votes is to prevail. But again, if there is a tie in unit votes, the candidate with the popular majority wins.

Appellee was allowed to amend his complaint so as to challenge the amended Act. The District Court held that the amended Act had some of the vices of the prior Act. It stated that under the amended Act "the vote of

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[3] Ga. Laws 1962, Ex. Sess., No. 1, p. 1217; Ga. Code Ann., §§ 34–3212, 34–3213 (1962).

each citizen counts for less and less as the population of the county of his residence increases." 203 F. Supp. 158, 170, n. 10. It went on to say:

> "There are 97 two-unit counties, totalling 194 unit votes, and 22 counties totalling 66 unit votes, altogether 260 unit votes, within 14 of a majority; but no county in the above has as much as 20,000 population. The remaining 40 counties range in population from 20,481 to 556,326, but they control altogether only 287 county unit votes. Combination of the units from the counties having the smallest population gives counties having population of one-third of the total in the state a clear majority of county units." *Ibid.*

The District Court held that as a result of *Baker* v. *Carr,* 369 U. S. 186, it had jurisdiction, that a justiciable case was stated, that appellee had standing, and that the Democratic primary in Georgia is "state" action within the meaning of the Fourteenth Amendment. It held that the county unit system as applied violates the Equal Protection Clause, and it issued an injunction,[4] not against conducting any party primary election under the county unit system, but against conducting such an election under a county unit system that does not meet the requirements specified by the court.[5] 203 F. Supp.

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[4] The order, dated April 28, 1962, was not restricted to the party primary of September 12, 1962; nor was the relief asked so restricted.

[5] The District Court in its order defined the type of county unit system which violated the Equal Protection Clause as follows:

"A county unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the vote for electors of the party in the most recent presidential election; provided, no discrimination is deemed to be invidious under such system if the disparity against any county is not in excess of the disparity

158. In other words, the District Court did not proceed on the basis that in a statewide election every qualified person was entitled to one vote and that all weighted voting was outlawed. Rather, it allowed a county unit system to be used in weighting the votes if the system showed no greater disparity against a county than exists against any State in the conduct of national elections.[6] Thereafter the Democratic Committee voted to hold the 1962 primary election for the statewide offices mentioned on a popular vote basis. We noted probable jurisdiction. 370 U. S. 921.

II.

We agree with the District Court that the action of this party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment. Judge Sibley, writing for the court in *Chapman* v. *King*, 154 F. 2d 460, showed with meticulous detail the manner in which Georgia regulates the conduct of party primaries (*id.*, pp. 463–464) and he concluded:

> "We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State." *Id.*, p. 464.

We agree with that result and conclude that state regulation of this preliminary phase of the election process

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that exists as against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress of the United States, and, provided provision is made for allocations to be adjusted to accord with changes in the basis at least once each ten years."

[6] See note 5, *supra*.

makes it state action. See *United States* v. *Classic,* 313 U. S. 299; *Smith* v. *Allwright,* 321 U. S. 649.

We also agree that appellee, like any person whose right to vote is impaired (*Smith* v. *Allwright, supra; Baker* v. *Carr, supra,* pp. 204–208), has standing to sue.[7]

Moreover, we think the case is not moot by reason of the fact that the Democratic Committee voted to hold

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[7] Chief Justice Holt stated over 250 years ago:

"A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature . . . . [I]t is a great injury to deprive . . . [him] of it. . . .

". . . It would look very strange, when the commons of *England* are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy . . . . This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. . . .

. . . . . .

"But in the principal case my brother says, we cannot judge of this matter, because it is a parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions. . . . To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to inlarge it. I agree we ought not to incroach or inlarge our jurisdiction; . . . but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us without incroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates." *Ashby* v. *White,* 2 Ld. Raym. 938, 953, 954, 956 (1702).

the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be "free to return to . . . [their] old ways." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632.

III.

On the merits we take a different view of the nature of the problem than did the District Court.

This case, unlike *Baker* v. *Carr, supra,* does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. Nor does it include the related problems of *Gomillion* v. *Lightfoot,* 364 U. S. 339, where "gerrymandering" was used to exclude a minority group from participation in municipal affairs. Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population. The District Court, however, analogized Georgia's use of the county unit system in determining the results of a statewide election to phases of our federal system. It pointed out that under the electoral college,[8] required by Art. II, § 1, of the Con-

[8] The electoral college was designed by men who did not want the election of the President to be left to the people. See S. Doc. No. 97, Survey of the Electoral College in the Political System of the United States, 79th Cong., 1st Sess. "George Washington was elected to the office of Chief Magistrate of the Nation, by 69 votes—the total num-

stitution and the Twelfth Amendment in the election of the President, voting strength "is not in exact proportion to population . . . . Recognizing that the electoral college was set up as a compromise to enable the formation of the Union among the several sovereign states, it still could hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious." 203 F. Supp., at 169.

Accordingly the District Court as already noted [9] held that use of the county unit system in counting the votes

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ber cast by the electors. At that time, three States did not vote. New York had not yet passed an electoral law, and North Carolina and Rhode Island had not yet ratified the Constitution. Therefore, of an estimated population of 4,000,000 people, a President was chosen by 69 voters, who had not been selected by the people, but appointed by State legislatures, save in the instances of Maryland and Virginia." *Id.*, p. 4.

Hamilton expressed the philosophy behind the electoral college in The Federalist No. 68. "This process of election affords a moral certainty, that the office of president, will seldom fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honors in a single state; but it will require other talents and a different kind of merit to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of president of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the constitution, by those, who are able to estimate the share, which the executive in every government must necessarily have in its good or ill administration."

Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.

[9] See note 5, *supra*.

in a statewide election was permissible "if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation." 203 F. Supp., at 170. Moreover the District Court held that use of the county unit system in counting the votes in a statewide election was permissible "if the disparity against any county is not in excess of the disparity that exists . . . under the equal proportions formula for representation of the several states in the Congress." *Ibid.* The assumption implicit in these conclusions is that since equality is not inherent in the electoral college and since precise equality among blocs of votes in one State or in the several States when it comes to the election of members of the House of Representatives is never possible, precise equality is not necessary in statewide elections.

We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions [10] are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns,[11] validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued. Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in *Baker* v. *Carr, supra.* The present case is only a voting case. Cf. *Nixon* v. *Herndon,* 273

[10] We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system.

[11] See note 8, *supra.*

U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *Smith* v. *Allwright, supra.* Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties.

States can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2. As we held in *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee is a qualified voter.

The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry* v. *Adams,* 345 U. S. 461. How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of

"we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

The Court has consistently recognized that all qualified voters have a constitutionally protected right "to cast their ballots and have them counted at Congressional elections." *United States* v. *Classic,* 313 U. S. 299, 315; see *Ex parte Yarbrough,* 110 U. S. 651; *Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487. Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in *United States* v. *Mosley,* 238 U. S. 383, 386, "the right to have one's vote counted" has the same dignity as "the right to put a ballot in a box." It can be protected from the diluting effect of illegal ballots. *Ex parte Siebold,* 100 U. S. 371; *United States* v. *Saylor,* 322 U. S. 385. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. See *United States* v. *Classic, supra; Smith* v. *Allwright, supra.* The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, see *Terry* v. *Adams, supra;* and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.

The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made "by the people." Minors, felons, and other classes may be excluded. See

*Lassiter* v. *Northampton Election Board, supra,* p. 51. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. As we stated in *Gomillion* v. *Lightfoot, supra,* p. 347:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

While we agree with the District Court on most phases of the case and think it was right in enjoining the use of the county unit system [12] in tabulating the votes, we vacate its judgment and remand the case so that a decree in conformity with our opinion may be entered.

*It is so ordered.*

MR. JUSTICE STEWART, whom MR. JUSTICE CLARK joins, concurring.

In joining the opinion and judgment of the Court, I emphasize what—but for my Brother HARLAN'S dissent—I should have thought would be apparent to all who read the Court's opinion. This case does not involve the

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[12] The county unit system, even in its amended form (see note 3, *supra*) would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded.

validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present. We do not deal here with "the basic ground rules implementing *Baker* v. *Carr*." This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote. *United States* v. *Classic*, 313 U. S. 299.

MR. JUSTICE HARLAN, dissenting.

When *Baker* v. *Carr*, 369 U. S. 186, was argued at the last Term we were assured that if this Court would only remove the roadblocks of *Colegrove* v. *Green*, 328 U. S. 549, and its predecessors to judicial review in "electoral" cases, this Court in all likelihood would never have to get deeper into such matters. State legislatures, it was predicted, would be prodded into taking satisfactory action by the mere prospect of legal proceedings.

These predictions have not proved true. As of November 1, 1962, the apportionment of seats in at least 30 state legislatures had been challenged in state and federal courts,[1] and, besides this one, 10 electoral cases of one kind or another are already on this Court's docket.[2] The present case is the first of these to reach plenary consideration.

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[1] Advisory Commission on Intergovernmental Relations, Report on Apportionment of State Legislatures, December 1962, p. A–21. I have been informed by the Administrative Office of the United States Courts that, by December 31, 1962, over 25 suits had been filed in the federal courts alone.

[2] No. 460, *WMCA, Inc.*, v. *Simon;* No. 507, *Wesberry* v. *Sanders;* No. 508, *Reynolds* v. *Sims;* No. 517, *Beadle* v. *Scholle;* No. 540, *Vann* v. *Frink;* No. 554, *Maryland Comm. for Fair Representation*

Preliminarily, it is symptomatic of the swift pace of current constitutional adjudication that the majority opinion should have failed to mention any of the four occasions on which Georgia's County Unit System has previously been unsuccessfully challenged in this Court. *Cook* v. *Fortson,* decided with *Turman* v. *Duckworth,* 329 U. S. 675 (1946); *South* v. *Peters,* 339 U. S. 276 (1950); *Cox* v. *Peters,* 342 U. S. 936 (1952); and *Hartsfield* v. *Sloan,* 357 U. S. 916 (1958).

It is true that none of these cases reached the stage of full plenary consideration but, in light of the judicial history recounted by Mr. Justice Frankfurter in his dissenting opinion in *Baker* v. *Carr, supra,* at 266, 278 *et seq.,* only the guileless could fail to recognize that the prevailing view then was that the validity of this County Unit System was not open to serious constitutional doubt.[3] This estimate of the earlier situation is highlighted by the dissenting opinion of JUSTICES BLACK and DOUGLAS in *South* v. *Peters, supra,* at 277, in which they unsuccessfully espoused the very views which now become the law. Presumably my two Brothers also reflected these same views in noting their dissents in the *Cox* and *Hartsfield* cases. See also *Cook* v. *Fortson,* etc., *supra,* in which MR. JUSTICE BLACK also noted his dissent.

But even if the Court's present silence about these cases can be deemed justified on the premise that their summary disposition can be satisfactorily accounted for on grounds not involving the merits, I consider today's decision not supportable.

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v. *Tawes;* No. 610, *McConnell* v. *Frink;* No. 688, *Price* v. *Moss;* No. 689, *Oklahoma Farm Bureau* v. *Moss;* No. 797, *Davis* v. *Mann.*

[3] Although the Solicitor General, as *amicus,* suggests that the Court's action in *South* v. *Peters* rested simply on a refusal to exercise federal equity power, it should be noted that the first case cited in the Court's *per curiam* affirmance is *MacDougall* v. *Green,* 335 U. S. 281. See *infra,* p. 385.

In the context of a nominating primary respecting candidates for statewide office, the Court construes the Equal Protection Clause of the Fourteenth Amendment as requiring that each person's vote be given equal weight. The majority says: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Ante*, p. 381. The Court then strikes down Georgia's County Unit System *as such*, a holding which the District Court declined to make. 203 F. Supp., at 170.

The Court's holding surely flies in the face of history. For, as impressively shown by the opinion of Frankfurter, J., in *Baker* v. *Carr* (369 U. S., at 301–324), "one person, one vote" has never been the universally accepted political philosophy in England, the American Colonies, or in the United States. The significance of this historical fact seems indeed to be recognized by the Court, for it implies that its new-found formula might not obtain in a case involving the apportionment of seats in the "State Legislature or for the Federal House of Representatives." *Ante*, p. 376.

But, independently of other reasons that will be discussed in a moment, any such distinction finds persuasive refutation in the Federal Electoral College whereby the President of the United States is chosen on principles wholly opposed to those now held constitutionally required in the electoral process for statewide office. One need not close his eyes to the circumstance that the Electoral College was born in compromise, nor take sides in the various attempts that have been made to change the system,[4] in order to agree with the court below that it "could

[4] See Wechsler, Presidential Elections and the Constitution: A Comment on Proposed Amendment, 35 A. B. A. J. 181 (1949).

hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious." 203 F. Supp., at 169.

Indeed this Court itself some 15 years ago rejected, in a comparable situation, the notion of political equality now pronounced. In *MacDougall* v. *Green*, 335 U. S. 281, challenge was made to an Illinois law requiring that nominating petitions of a new political party be signed by at least 25,000 voters, including a minimum of 200 voters from each of at least 50 of the 102 counties in the State. The claim was that the "200 requirement" made it possible for "the voters of the less populous counties . . . to block the nomination of candidates whose support is confined to geographically limited areas." *Id.*, at 283. In disallowing this claim, the Court said (*id.*, at 283–284):

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Certainly no support for this equal protection doctrine can be drawn from the Fifteenth, Seventeenth, or

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Nineteenth Amendment. The Fifteenth Amendment simply assures that the right to vote shall not be impaired "on account of race, color, or previous condition of servitude." The Seventeenth Amendment provides that Senators shall be "elected by the people," with no indication that all people must be accorded a vote of equal weight. The Nineteenth Amendment merely gives the vote to women. And it is hard to take seriously the argument that "dilution" of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity, *e. g., United States* v. *Mosley,* 238 U. S. 383, *United States* v. *Classic,* 313 U. S. 299, *United States* v. *Saylor,* 322 U. S. 385, or to the disenfranchisement of qualified voters on purely racial grounds, *Gomillion* v. *Lightfoot,* 364 U. S. 339.

A violation of the Equal Protection Clause thus cannot be found in the *mere* circumstance that the Georgia County Unit System results in disproportionate vote weighting. It "is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness . . . ." *Louisville & Nashville R. Co.* v. *Barber Asphalt Co.,* 197 U. S. 430, 434 (Holmes, J.). What then remains of the equal protection claim in this case?

At the core of Georgia's diffusion of voting strength which favors the small as against the large counties is the urban-rural problem, so familiar in the American political scene. In my dissent in *Baker* v. *Carr,* 369 U. S., at 336, I expressed the view that a State might rationally conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities than to urban centers, lest the legitimate interests of the former be submerged in the stronger electoral voice of the latter. In my opinion, recognition of the same factor cannot be deemed irrational in the present situation,

even though all of the considerations supporting its use in a legislative apportionment case are not present here.

Given the undeniably powerful influence of a state governor on law and policy making,[5] I do not see how it can be deemed irrational for a State to conclude that a candidate for such office should not be one whose choice lies with the numerically superior electoral strength of urban voters. By like token, I cannot consider it irrational for Georgia to apply its County Unit System to the selection of candidates for other statewide offices[6] in order to assure against a predominantly "city point of view" in the administration of the State's affairs.

On the existing record, this leaves the question of "irrationality" in this case to be judged on the basis of pure arithmetic. The Court by its "one person, one vote" theory in effect avoids facing up to that problem, but the District Court did face it, holding that the disparities in voting strength between the largest county (Fulton) and the four smallest counties (Webster, Glascock, Quitman, and Echols), running respectively 8 to 1, 10 to 1, 11 to 1,

[5] The Georgia Constitution vests in the Governor the State's "executive power," and authorizes him to recommend legislation, make reports to and call extraordinary sessions of the State General Assembly, issue writs of election to fill vacancies in the General Assembly, veto or approve bills and resolutions, and require reports from the various departments of the State. Ga. Const. of 1945, Art. V, §§ 2–3001 to 2–3017. Also, by statute, payments cannot be made from the state treasury without a warrant issued by the Governor, Ga. Code Ann., § 40–204, and in the event of a public emergency the Governor is authorized to promulgate and enforce such rules and regulations as are necessary to prevent, control, or quell violence, threatened or actual, Ga. Code Ann., § 40–213.

[6] Those involved in this case, besides Governor, are United States Senator, Lieutenant Governor, Secretary of State, Justice of the Supreme Court, Judge of the Court of Appeals, Attorney General, Comptroller General, Commissioner of Labor, and Treasurer. The Governor has a general power to fill vacancies in such offices, unless otherwise provided by law. Ga. Const. of 1945, Art. V, § 2–3013.

and 14 to 1 in favor of the latter,[7] were invidiously discriminatory. But it did not tell us why. I do not understand how, on the basis of these mere numbers, unilluminated as they are by any of the complex and subtle political factors involved, a court of law can say, except by judicial fiat, that these disparities are in themselves constitutionally invidious.

The disproportions in the Georgia County Unit System are indeed not greatly out of line with those existing under the Electoral College count for the Presidency. The disparity in population per Electoral College vote between New York (the largest State in the 1960 census) and Alaska (the smallest) was about 5 to 1.[8] There are only 15 Georgia counties, out of a total of 159, which have a greater disparity per unit vote, and of these 15 counties 4 have disparity of less than 6 to 1. It is thus apparent that a slight modification of the Georgia plan could bring it within the tolerance permitted in the federal scheme.

It was of course imponderables like these that lay at the root of the Court's steadfast pre-*Baker* v. *Carr* refusal "to enter [the] political thicket." *Colegrove* v. *Green*, *supra*, at 556. Having turned its back on this wise chapter in its history, the Court, in my view, can no longer escape the necessity of coming to grips with the thorny problems it so studiously strove to avoid in *Baker* v. *Carr*

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[7]

| *County* | *Population* | *Unit Vote* | *Population per Unit Vote* | *Ratio to Fulton County* |
|---|---|---|---|---|
| Fulton | 556,326 | 40 | 13,908 | |
| DeKalb | 256,782 | 20 | 12,839 | |
| Chatham | 188,299 | 16 | 11,760 | |
| Muscogee | 158,623 | 14 | 11,330 | |
| Webster | 3,247 | 2 | 1,623 | 8 to 1 |
| Glascock | 2,672 | 2 | 1,336 | 10 to 1 |
| Quitman | 2,432 | 2 | 1,216 | 11 to 1 |
| Echols | 1,876 | 2 | 938 | 14 to 1 |

[8] Statistical Abstract of the United States 10, 366 (1962).

(see concurring opinion of STEWART, J., 369 U. S., at 265, and dissenting opinion of HARLAN, J., *id.*, at 339) and in two subsequent cases, *Scholle* v. *Hare*, 369 U. S. 429, 430 (concurring opinion of CLARK, J., and STEWART, J.), 430–435 (dissenting opinion of HARLAN, J.); *W. M. C. A., Inc.*, v. *Simon*, 370 U. S. 190, 191–194 (dissenting opinion of HARLAN, J.). To regard this case as being outside the general stream of electoral cases because only two other States, Maryland and Mississippi, have county unit systems, is to hide one's head in the sand.

What then should be the test of "rationality" in this judicially unfamiliar field? My Brother CLARK has perhaps given us a clue in the legislative inactivity—absence of any other remedy—crazy quilt approach contained in his concurring opinion in *Baker* v. *Carr*, *supra*, at 253–262. But I think a formulation of the basic ground rules in this untrod area of judicial competence should await a fully developed record. This case is here at an interlocutory stage. The temporary injunction before us issued upon a record consisting only of the pleadings, answers to interrogatories, affidavits, statistical material, and what the lower court described as a "liberal use of our right to take judicial notice of matters of common knowledge and public concern." 203 F. Supp., at 160, n. 1. No full-dress exploration of any of the many intricate questions involved in establishing criteria for judging "rationality" took place, the opinion and decree below issued the day following the hearing, and the District Court observed that, while its standards of equal protection (which this Court now puts aside) "may appear doctrinaire to some extent," it was constrained to act as it did because of the then (but no longer existing) [9] urgency of the situation. 203 F. Supp., at 170.

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[9] Following the District Court's injunction, a statewide direct primary was held.

Surely, if the Court's "one person, one vote" ideology is constitutionally untenable, as I think it clearly is, the basic ground rules implementing *Baker* v. *Carr* should await the trial of this or some other case in which we have before us a fully developed record. Only then can we know what we are doing. Cf. *White Motor Co.* v. *United States, ante,* p. 253. A matter which so profoundly touches the barriers between federal judicial and state legislative authority demands nothing less.

I would vacate the judgment of the District Court and remand the case for trial.

# FAY, WARDEN, ET AL. *v.* NOIA.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 84. Argued January 7–8, 1963.—Decided March 18, 1963.

In 1942, respondent and two codefendants were convicted in a New York State Court of murder committed during a robbery, and each was sentenced to life imprisonment. The sole evidence against each was his confession. Respondent did not appeal; but his codefendants did. Their appeals were unsuccessful; but subsequent proceedings resulted in their release on the ground that their confessions were coerced and their convictions violated the Fourteenth Amendment. Thereafter, respondent applied to the State Court for a *coram nobis* review of his conviction; but this was denied ultimately because of his failure to appeal. He then applied to a Federal District Court for a writ of habeas corpus, which was denied on the ground that his failure to appeal was a failure to exhaust available state remedies, within the meaning of 28 U. S. C. § 2254, although it was conceded that respondent's confession had been coerced. The Court of Appeals reversed. *Held:* The judgment of the Court of Appeals is affirmed on other grounds. Pp. 394–441.

1. Under the conditions of modern society, respondent's imprisonment under a conviction procured by a coerced confession, which the State concedes was obtained in violation of the Fourteenth Amendment, is intolerable; and habeas corpus is the appropriate remedy. Pp. 399–415.

(a) The basic principle of the Great Writ of habeas corpus is that, in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: If the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Pp. 399–402.

(b) A review of the history of habeas corpus shows that, when the Suspension Clause, Art. I, § 9, Cl. 2, was written into the Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas corpus was available to remedy any kind of governmental

restraint contrary to the fundamental law; and it would appear that the Constitution invites, if it does not compel, a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice. Pp. 402–406.

(c) Changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them constitutionally intolerable should not be allowed to obscure the basic continuity in the conception of the writ as a remedy for such imprisonments. Pp. 406–415.

2. The exigencies of federalism do not compel a different result. Pp. 415–426.

(a) The rule that a state prisoner must exhaust his remedies in the state courts before applying to a federal court for a writ of habeas corpus, which evolved as a matter of accommodation between state and federal courts and is now codified in 28 U. S. C. § 2254, is a doctrine of comity between courts. It is not one defining power but one which relates to the appropriate exercise of power. Pp. 415–420.

(b) Save in one decision, which has since been repudiated, this Court has consistently held that, after the state courts had decided the federal question on the merits against the applicant, he could apply to the federal courts for habeas corpus and there relitigate the question. Pp. 420–422.

(c) Even if the state court adjudication turns wholly on primary, historical facts, a Federal District Court has a broad *power* on habeas corpus to hold an evidentiary hearing and determine the facts. P. 422.

(d) Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review. Pp. 422–424.

(e) By relying on a rule of discretion, avowedly flexible and always yielding to "exceptional circumstances," this Court has refused to concede jurisdictional significance to abortive state-court proceedings. Pp. 424–426.

3. Federal courts have *power* under the federal habeas corpus statute, 28 U. S. C. §§ 2241 *et seq.*, to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies. The doctrine under which state procedural defaults are held to constitute an adequate and independent

state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas corpus statute. Pp. 398–399, 426–434.

(a) Federal court jurisdiction in a habeas corpus proceeding is conferred by the allegation of an unconstitutional restraint, and it is not defeated by anything that may occur in the state proceedings. Pp. 426–427.

(b) Due process denied in the state proceedings leading to a conviction is not restored just because a state court declines to adjudicate on the merits the claim of such denial. P. 427.

(c) By committing a procedural default, a defendant may be debarred from challenging his conviction in the state courts, even on federal constitutional grounds; but forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured. Pp. 427–428.

(d) The federal courts are not without power to grant habeas corpus relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision. Pp. 428–434.

4. Respondent's failure to appeal was not a failure to exhaust "the remedies available in the courts of the State," as required by 28 U. S. C. § 2254. That requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. Pp. 434–435.

5. *Darr* v. *Burford*, 339 U. S. 200, is overruled to the extent that it required a state prisoner to seek certiorari in this Court before seeking federal habeas corpus relief. Pp. 435–438.

6. Respondent's failure to appeal cannot, in the circumstances of this case, be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief. Pp. 399, 438–440.

(a) A federal judge may, in his discretion, deny relief to an applicant for habeas corpus who has deliberately by-passed the orderly procedure of state courts and in so doing has forfeited his state-court remedies. P. 438.

(b) This grant of discretion is not to be interpreted as permission to introduce legal fictions into federal habeas corpus proceedings. It is applicable only when the petitioner himself has

understandingly and knowingly foregone the privilege of seeking to vindicate his federal claims in the state courts. P. 439.

(c) In the circumstances of this case, it cannot be said that respondent's failure to appeal justified the withholding of federal habeas corpus relief. Pp. 439–440.

300 F. 2d 345, affirmed on other grounds.

*William I. Siegel* argued the cause for petitioners. With him on the brief was *Edward S. Silver.*

*Leon B. Polsky* argued the cause and filed a brief for respondent.

*Joseph J. Rose,* Assistant Attorney General of New York, argued the cause for the State of New York, as *amicus curiae,* urging reversal. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Paxton Blair,* Solicitor General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents important questions touching the federal habeas corpus jurisdiction, 28 U. S. C. §§ 2241 *et seq.,* in its relation to state criminal justice. The narrow question is whether the respondent Noia may be granted federal habeas corpus relief from imprisonment under a New York conviction now admitted by the State to rest upon a confession obtained from him in violation of the Fourteenth Amendment, after he was denied state post-conviction relief because the coerced confession claim had been decided against him at the trial and Noia had allowed the time for a direct appeal to lapse without seeking review by a state appellate court.

Noia was convicted in 1942 with Santo Caminito and Frank Bonino in the County Court of Kings County, New York, of a felony murder in the shooting and killing of one Hammeroff during the commission of a robbery.

The sole evidence against each defendant was his signed confession. Caminito and Bonino, but not Noia, appealed their convictions to the Appellate Division of the New York Supreme Court. These appeals were unsuccessful, but subsequent legal proceedings resulted in the releases of Caminito and Bonino on findings that their confessions had been coerced and their convictions therefore procured in violation of the Fourteenth Amendment.[1] Although it has been stipulated that the coercive nature

[1] The Appellate Division of the New York Supreme Court and the New York Court of Appeals, on the direct appeals of Caminito and Bonino, affirmed the convictions. *People* v. *Bonino, People* v. *Caminito,* 265 App. Div. 960, 38 N. Y. S. 2d 1019 (1942); 291 N. Y. 541 (1943), 50 N. E. 2d 654. Certiorari was not sought here. Motions to reargue appeals in the New York Court of Appeals may be made at any time. Caminito filed motions for reargument in 1948 and 1954. The motions were denied. 297 N. Y. 882, 79 N. E. 2d 277; 307 N. Y. 686, 120 N. E. 2d 857; we denied certiorari from the second denial. 348 U. S. 839. Bonino filed a similar motion in 1947, which was denied, 296 N. Y. 1004, 73 N. E. 2d 579. Certiorari was denied. 333 U. S. 849. Caminito then sought federal habeas corpus in the District Court for the Northern District of New York. The application was denied. 127 F. Supp. 689 (1955). The Court of Appeals for the Second Circuit reversed, sustaining Caminito's claim that his confession had been procured in violation of the Fourteenth Amendment; he was directed to be discharged unless the State accorded him a new trial. *United States ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (1955); certiorari was denied, 350 U. S. 896. After Caminito's success Bonino filed a motion for reargument of his appeal in the New York Court of Appeals. The motion was granted and his conviction was also set aside and a new trial ordered on the ground that his confession had been unconstitutionally procured. *People* v. *Bonino,* 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956). Both Caminito and Bonino are now at liberty. It was said by the District Court in the opinion denying Noia relief in federal habeas, "Even though Bonino and Caminito still remain under indictment it is most highly improbable that they will ever be tried again since the State presented no evidence but the presently unavailable coercion [*sic*] confessions in 1942. The obtaining of new evidence would appear at this late date impossible." 183 F. Supp., at 227, n. 6.

of Noia's confession was also established,[2] the United States District Court for the Southern District of New York held in Noia's federal habeas corpus proceeding that because of his failure to appeal he must be denied relief under the provision of 28 U. S. C. § 2254 whereby "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ." 183 F. Supp. 222 (1960).[3] The Court of

[2] The stipulation is as follows:

"For purposes of this proceeding, the District Attorney of Kings County concedes that the coercive nature of the confession elicited from the respondent and introduced in evidence against him at the trial in Kings County Court was established and, therefore, the record of trial need not be printed." Brief for Respondent, p. 15, star footnote.

The facts surrounding the taking of the three confessions were essentially the same. A vivid statement of these facts is given in *United States ex rel. Caminito* v. *Murphy, supra.* The Court of Appeals condemned in strong terms the methods used to obtain the confessions. "All decent Americans soundly condemn satanic practices, like those described above, when employed in totalitarian regimes. It should shock us when American police resort to them, for they do not comport with the barest minimum of civilized principles of justice. . . ." 222 F. 2d, at 701.

[3] After Caminito and Bonino were released, Noia, unable to employ the procedure of a motion for reargument since he had not appealed from his conviction, made an application to the sentencing court in the nature of *coram nobis.* The Kings County Court set aside his conviction. *People* v. *Noia,* 3 Misc. 2d 447, 158 N. Y. S. 2d 683 (1956). The Appellate Division of the Supreme Court reversed and reinstated the judgment of conviction, 4 App. Div. 2d 698, 163 N. Y. S. 2d 796 (1957). The New York Court of Appeals affirmed the Appellate Division *sub nom. People* v. *Caminito,* 3 N. Y. 2d 596, 148 N. E. 2d 139 (1958). The Court of Appeals held that "[Noia's] failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize . . . *coram nobis.* . . . And this is so even though the asserted error or irregularity relates to a violation of constitutional right. . . ." 3

Appeals for the Second Circuit reversed, one judge dissenting, and ordered that Noia's conviction be set aside and that he be discharged from custody unless given a new trial forthwith. 300 F. 2d 345 (1962). The Court of Appeals questioned whether § 2254 barred relief on federal habeas corpus where the applicant had failed to exhaust state remedies no longer available to him at the time the habeas proceeding was commenced (here a direct appeal from the conviction), but held that in any event exceptional circumstances were present which excused compliance with the section. The court also rejected other arguments advanced in support of the proposition that the federal remedy was unavailable to Noia. The first was that the denial of state post-conviction *coram nobis* relief on the ground of Noia's failure to appeal barred habeas relief because such failure consti-

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N. Y. 2d, at 601, 148 N. E. 2d, at 143. Certiorari was denied *sub nom. Noia* v. *New York*, 357 U. S. 905. Noia then brought the instant federal habeas corpus proceeding in the District Court for the Southern District of New York.

The District Court held a hearing limited to an inquiry into the facts surrounding Noia's failure to appeal but made no findings as to Noia's reasons. Noia and the lawyer who defended him at his trial testified. Noia said that while aware of his right to appeal, he did not appeal because he did not wish to saddle his family with an additional financial burden and had no funds of his own. The gist of the lawyer's testimony was that Noia was also motivated not to appeal by fear that if successful he might get the death sentence if convicted on a retrial. The trial judge, not bound to accept the jury's recommendation of a life sentence, had said when sentencing him, "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance." Record, ff. 2261–2262. Noia's confession included an admission that he was the one who had actually shot the victim.

tuted an adequate and independent state ground of decision, such that this Court on direct review of the state *coram nobis* proceedings would have declined to adjudicate the federal questions presented. In rejecting this argument, the court—while expressing the view that "[j]ust as it would be an encroachment on the prerogatives of the state for the Supreme Court upon direct review to disregard the state ground, equally—if not more so—would it be a trespass against the state for a lower federal court, upon a petition for habeas corpus, to disregard the state ground in granting relief to the prisoner," 300 F. 2d, at 359—held that the exceptional circumstances excusing compliance with § 2254 also established that Noia's failure to appeal was not a state procedural ground adequate to bar the federal habeas remedy: "The coincidence of these factors: the undisputed violation of a significant constitutional right, the knowledge of this violation brought home to the federal court at the incipiency of the habeas corpus proceeding so forcibly that the state made no effort to contradict it, and the freedom the relator's codefendants now have by virtue of their vindications of the identical constitutional right leads us to conclude that the state procedural ground, that of a simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate." 300 F. 2d, at 362. The second argument was that Noia's failure to appeal was to be deemed a waiver of his claim that he had been unconstitutionally convicted. The Court of Appeals rejected this argument on the ground that no waiver could be inferred in the circumstances. *Id.*, at 351–352.

We granted certiorari. 369 U. S. 869. We affirm the judgment of the Court of Appeals but reach that court's result by a different course of reasoning. We hold: (1) Federal courts have *power* under the federal habeas statute to grant relief despite the applicant's failure to

have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. (2) Noia's failure to appeal was not a failure to exhaust "the remedies available in the courts of the State" as required by § 2254; that requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. (3) Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief.

## I.

The question has been much mooted under what circumstances, if any, the failure of a state prisoner to comply with a state procedural requirement, as a result of which the state courts decline to pass on the merits of his federal defense, bars subsequent resort to the federal courts for relief on habeas corpus.[4] Plainly it is a question that has important implications for federal-state relations in the area of the administration of criminal justice. It cannot be answered without a preliminary inquiry into the historical development of the writ of habeas corpus.

We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*,[5] in

[4] *E. g.*, Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961); Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423 (1961); Hart, Foreword, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 101–121 (1959).

[5] Habeas corpus has always had other functions besides inquiry into illegal detention with a view to an order releasing the petitioner. Blackstone names four: *habeas corpus ad respondendum; ad satis-*

Anglo-American jurisprudence: "the most celebrated writ in the English law." 3 Blackstone Commentaries 129. It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I." *Secretary of State for Home Affairs* v. *O'Brien,* [1923] A. C. 603, 609 (H. L.). Received into our own law in the colonial period,[6] given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2,[7] incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c. 20, § 14, 1 Stat. 81–82, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege." *Ex parte Bollman and Swartwout,* 4 Cranch 75, 95. Only two Terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' *Bowen* v. *Johnston,* 306 U. S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution." *Smith* v. *Bennett,* 365 U. S. 708, 713.

These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal

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*faciendum; ad prosequendum, testificandum, deliberandum; ad faciendum et recipiendum.* 3 Commentaries 129–132. See, *e. g., Carbo* v. *United States,* 364 U. S. 611; *Price* v. *Johnston,* 334 U. S. 266. The present case, of course, concerns only the *ad subjiciendum* form.

[6] Church, Habeas Corpus (1884), §§ 38–45; Carpenter, Habeas Corpus in the Colonies, 8 Am. Hist. Rev. 18 (1902).

[7] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century,[8] but also in America from our very beginnings, and today.[9] Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever

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[8] See 1 Holdsworth, History of English Law (1927), 227–228; Chafee, The Most Important Human Right in the Constitution, 32 B. U. L. Rev. 143, 146–159 (1952).

[9] See Church, *supra*, note 6, § 40; *Ex parte Bollman and Swartwout*, *supra* (petition for habeas by alleged seditious co-conspirators of Aaron Burr); *Ex parte Milligan*, 4 Wall. 2 (presidential power to institute trial by military tribunal during Civil War); *Ex parte Quirin*, 317 U. S. 1 (habeas sought by German saboteurs sentenced to death by a secret military tribunal); *Ex parte Endo*, 323 U. S. 283 (power to hold loyal citizen of Japanese descent in relocation center in World War II challenged on habeas). All the significant statutory changes in the federal writ have been prompted by grave political crises. The first modification of the provisions of the Judiciary Act of 1789 was made in the Force Act of March 2, 1833, c. 57, § 7, 4 Stat. 634–635, in response to South Carolina's nullification ordinance. The Act provided that federal courts and judges could release from state custody persons who had been acting under federal authority. The Act of August 29, 1842, c. 257, 5 Stat. 539–540, which extended federal habeas to foreign nationals acting under authority of a foreign state, was prompted by British diplomatic protest following the trial of a Canadian soldier by a New York State court. See *People* v. *McLeod*, 25 Wend. 483 (N. Y. Sup. Ct. 1841). The Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386, which extended federal habeas to state prisoners generally, was passed in anticipation of possible Southern recalcitrance toward Reconstruction legislation. See p. 415, *infra*. That was the last important statutory change. See Rev. Stat., 1874, §§ 751–766; 28 U. S. C. §§ 451–466 (1940 ed.); 28 U. S. C. §§ 2241–2255 (1958 ed.); Longsdorf, The Federal Habeas Corpus Acts Original and Amended, 13 F. R. D. 407 (1953).

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society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office. In 1593, for example, a bill was introduced in the House of Commons, which, after deploring the frequency of violations of "the great Charter and auncient good Lawes and statutes of this realme," provided:

> "Fore remedy whereof be it enacted: That the provisions and prohibicions of the said great Charter and other Lawes in that behalfe made be dulie and inviolatelie observed. And that no person or persons be hereafter committed to prison but yt be by sufficient warrant and Authorities and by due course and proceedings in Lawe . . . .
>
> "And that the Justice of anie the Queenes Majesties Courts of Recorde at the common Lawe maie awarde a writt of habeas Corpus for the deliverye of anye person so imprisoned . . . ." [10]

Although it was not enacted, this bill accurately prefigured the union of the right to due process drawn from Magna Charta and the remedy of habeas corpus accomplished in the next century.

Of course standards of due process have evolved over the centuries. But the nature and purpose of habeas corpus have remained remarkably constant. History refutes the notion that until recently the writ was avail-

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[10] Quoted in Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty (1960), 44–45.

able only in a very narrow class of lawless imprisonments. For example, it is not true that at common law habeas corpus was exclusively designed as a remedy for executive detentions; it was early used by the great common-law courts to effect the release of persons detained by order of inferior courts.[11] The principle that judicial as well as executive restraints may be intolerable received dramatic expression in *Bushell's Case,* Vaughan, 135, 124 Eng. Rep. 1006, 6 Howell's State Trials 999 (1670). Bushell was one of the jurors in the trial, held before the Court of Oyer and Terminer at the Old Bailey, of William Penn and William Mead on charges of tumultuous assembly and other crimes. When the jury brought in a verdict of not guilty, the court ordered the jurors committed for contempt. Bushell sought habeas corpus, and the Court of Common Pleas, in a memorable opinion by Chief Justice Vaughan, ordered him discharged from custody. The case is by no means isolated,[12] and when habeas corpus practice was codified in the Habeas Corpus Act of 1679, 31 Car. II, c. 2, no distinction was made between executive and judicial detentions.[13]

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[11] 1 Holdsworth, *supra,* note 8, at 227. See, *e. g., Dolphin* v. *Shutford* (1542), reported in 2 Marsden, Select Pleas in the Court of Admiralty (1897), pp. xlvi-xlvii, discussed in Walker, *supra,* note 10, at 24 (King's Bench issued habeas to remove prisoner held pursuant to order of the Admiralty Court). See further Walker, *supra,* at 22–25. Of course the state courts are not inferior courts in any sense thought (at least by King's Bench) to be true of the Admiralty Court; the issuance of writs of habeas by the federal courts is, rather, an aspect of the supremacy of federal law. *Brown* v. *Allen,* 344 U. S. 443, 510 (opinion of Mr. Justice Frankfurter).

[12] See, *e. g., Crepps* v. *Durden,* 2 Cowper 640, 98 Eng. Rep. 1283 (K. B. 1777); *Rex* v. *Collyer,* Sayer 44, 96 Eng. Rep. 797 (K. B. 1752); *King* v. *Hawkins,* Fort. 272, 92 Eng. Rep. 849 (K. B. 1715); Ingersoll, History and Law of the Writ of Habeas Corpus (1849), 29–31.

[13] To be sure, the Act expressly excepts judicial detentions that have ripened into criminal convictions. But this exception was not

Nor is it true that at common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court. *Bushell's Case* is again in point. Chief Justice Vaughan did not base his decision on the theory that the Court of Oyer and Terminer had no jurisdiction to commit persons for contempt, but on the plain denial of due process, violative of Magna Charta, of a court's imprisoning the jury because it disagreed with the verdict:

> ". . . [W]hen a man is brought by Habeas Corpus to the Court, and upon retorn of it, it appears to the Court, That he was against Law imprison'd and detain'd, . . . he shall never be by the Act of the Court remanded to his unlawful imprisonment, for then the Court should do an act of Injustice in imprisoning him, de novo, against Law, whereas the great Charter is Quod nullus libet homo imprisonetur nisi per legem terrae; This is the present case, and this was the case upon all the Presidents [precedents] produc'd and many more that might be produc'd, where upon Habeas Corpus, many have been discharg'd . . . .
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> "This appears plainly by many old Books, if the Reason of them be rightly taken, For insufficient causes are as no causes retorn'd; and to send a man

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intended to have the effect of denying the protection of habeas corpus for such persons in appropriate cases. Rather, such persons were excluded simply from the coverage of the Act and remitted to their common-law rights to habeas—as construed, for example, in *Bushell's Case*—because the Act was designed to meet the problem of bail, which had principal relevance at the preconviction stage. See Brief of Paul A. Freund, Assigned Counsel, for Respondent, *United States* v. *Hayman*, 342 U. S. 205 (No. 23, October Term 1951), pp. 31–32. Furthermore, the English statutes governing habeas have never been regarded as preempting common-law rights to the writ. *Id.*, at 32; 11 Halsbury, Laws of England (3d ed. 1955), Crown Proceedings, p. 28, n. (*u*).

> back to Prison for no cause retorn'd, seems unworthy of a Court." Vaughan, at 156, 124 Eng. Rep., at 1016, 9 Howell's State Trials, at 1023.

To the same effect, we read in Bacon's Abridgment:

> "[I]f the commitment be against law, as being made by one who had no jurisdiction of the cause, *or for a matter for which by law no man ought to be punished,* the court are to discharge him . . . ; and the commitment is liable to the same objection where the cause is so loosely set forth, that the court cannot adjudge *whether it were a reasonable ground of imprisonment or not.*" [14]

Thus, at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law. In this connection it is significant that neither the Constitution nor the Judiciary Act anywhere defines the writ, although the Act does intimate, 1 Stat. 82, that its issuance is to be "agree-

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[14] Habeas Corpus (Bouvier ed., 1856), B 10. (Italics supplied.) See also 2 Hale, History of the Pleas of the Crown, 144: "if it appear upon the return [to the writ of habeas corpus], that the party is wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisond, the privilege shall be allowd, and the person discharged from that imprisonment." In Hale's Analysis of the Civil Part of the Law (4th ed.), 78, habeas corpus is described as a remedy to remove or avoid imprisonment "without lawful or just cause," and is elsewhere expressly linked with due process of law: "here falls in all the learning upon the stat. of magna charta, and charta de foresta, which concerns THE LIBERTY OF THE SUBJECT; especially magna charta, cap. 29. and those other statutes that relate to the imprisonment of the subject without due process of law; as the learning of habeas corpus, and the returns thereupon . . . ." *Id.,* at 31.

able to the principles and usages of law"—the common law, presumably. We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been some intimations of support for such a proposition in decisions of this Court. Thus Mr. Justice (later Chief Justice) Stone wrote for the Court that "[t]he use of the writ . . . as an *incident of the federal judicial power* is implicitly recognized by Article I, § 9, Clause 2 of the Constitution." *McNally* v. *Hill*, 293 U. S. 131, 135. (Italics supplied.) To the same effect are the words of Chief Justice Chase in *Ex parte Yerger*, 8 Wall. 85, 95: "The terms of this provision [the Suspension Clause] necessarily imply judicial action." And see *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 295 (concurring opinion).[15] But at all events it would appear that the Constitution invites, if it does not compel, cf. *Byrd* v. *Blue Ridge Rural Elec. Cooperative*, 356 U. S. 525, 537, a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice.

The early decision of this Court in *Ex parte Watkins*, 3 Pet. 193, which held that the judgment of a federal court

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[15] "[H]aving established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter." Brief, *supra*, note 13, at 29. It is also pointed out there, *id.*, at 28, that the withdrawal of the Supreme Court's jurisdiction of federal habeas appeals, which was upheld in *Ex parte McCardle*, 7 Wall. 506, did not affect the power of the lower federal courts to grant habeas.

A contrary argument is presented in Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace? 40 Calif. L. Rev. 335 (1952). We intimate no view on any of these constitutional questions.

of competent jurisdiction could not be impeached on habeas, seems to have viewed the power more narrowly; see also *Ex parte Kearney,* 7 Wheat. 38. But *Watkins* may have been compelled by factors, affecting peculiarly the jurisdiction of this Court, which are not generally applicable to federal habeas corpus powers. It was plain from the decision in *Marbury* v. *Madison,* 1 Cranch 137, 174–175, which had narrowly construed the grant of original jurisdiction to the Supreme Court in Article III, that the Court would have the power to issue writs of habeas corpus only if such issuance could be deemed an exercise of appellate jurisdiction. Confronted with the question in *Ex parte Bollman and Swartwout,* 4 Cranch 75—like *Watkins,* a case of direct application to the Court for the writ—the Court held that the jurisdiction "which the court is now asked to exercise is clearly *appellate.* It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol." 4 Cranch, at 100. This answer sufficed to enable the discharge of the petitioners, who had been committed (but not tried or convicted) for treason; but at the same time it virtually dictated the result in *Watkins.* The Court had no general jurisdiction of appeals from federal criminal judgments, see pp. 412–413, *infra;* if, therefore, the writ of habeas corpus was appellate in nature, its issuance to vacate such a judgment would have the effect of accomplishing indirectly what the Court had no power to do directly. This reasoning is prominent in Chief Justice Marshall's opinion for the Court in *Watkins.* See 3 Pet., at 203.

Strictly, then, *Watkins* is authority only as to this Court's power to issue the writ; the habeas jurisdiction of the other federal courts and judges, including the individual Justices of the Supreme Court, has generally been deemed original. *In re Kaine,* 14 How. 103; *Ex parte Yerger,* 8 Wall. 85, 101. But cf. *Ex parte Clarke,* 100 U. S. 399. But even as to this Court's power, the life of

the principles advanced in *Watkins* was relatively brief.[16] In *Ex parte Lange*, 18 Wall. 163, again a case of direct application to this Court for the writ, the Court ordered the release of one duly convicted in a Federal Circuit Court. The trial judge, after initially imposing upon the defendant a sentence in excess of the legal maximum, had attempted to correct the error by resentencing him. The Court held this double-sentencing procedure unconstitutional, on the ground of double jeopardy, and while conceding that the Circuit Court had a general competence in criminal cases, reasoned that it had no jurisdiction to render a patently lawless judgment.

This marked a return to the common-law principle that restraints contrary to fundamental law, by whatever authority imposed, could be redressed by writ of habeas corpus. See also *Ex parte Wells*, 18 How. 307; *Ex parte Parks*, 93 U. S. 18, 21. The principle was clearly stated a few years after the *Lange* decision by Mr. Justice Bradley, writing for the Court in *Ex parte Siebold*, 100 U. S. 371, 376–377:

> ". . . The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense

[16] The present status of *Watkins* with respect to problems of our jurisdiction to issue the writ on original applications to this Court is not of course at issue in the instant case. See Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Supreme Court Review (Kurland ed.), 153. Cf. *Ex parte Peru*, 318 U. S. 578.

> that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* . . . ."

The course of decisions of this Court from *Lange* and *Siebold* to the present makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction.[17]

The same principles have consistently been applied in cases of state prisoners seeking habeas corpus in the federal courts, although the development of the law in this area was at first delayed for several reasons. The first Judiciary Act did not extend federal habeas to prisoners in state custody, *Ex parte Dorr*, 3 How. 103; and shortly after Congress removed this limitation in 1867, it withdrew from this Court jurisdiction of appeals from habeas

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[17] *E. g.*, *Ex parte Jackson*, 96 U. S. 727; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Wilson*, 114 U. S. 417; *In re Snow*, 120 U. S. 274; *Ex parte Bain*, 121 U. S. 1; *Callan* v. *Wilson*, 127 U. S. 540; *In re Coy*, 127 U. S. 731; *United States* v. *DeWalt*, 128 U. S. 393; *Nielsen, Petitioner*, 131 U. S. 176; *In re Bonner*, 151 U. S. 242; *Andersen* v. *Treat*, 172 U. S. 24; *Hawaii* v. *Mankichi*, 190 U. S. 197; *In re Heff*, 197 U. S. 488; *Morgan* v. *Devine*, 237 U. S. 632; *Arndstein* v. *McCarthy*, 254 U. S. 71; *Escoe* v. *Zerbst*, 295 U. S. 490; *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19; *Holiday* v. *Johnston*, 313 U. S. 342; *Waley* v. *Johnston*, 316 U. S. 101; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Von Moltke* v. *Gillies*, 332 U. S. 708; *United States* v. *Hayman*, 342 U. S. 205, 212.

Since the enactment of 28 U. S. C. § 2255 in 1948 (motion to the sentencing court, in the nature of *coram nobis;* see *United States* v. *Hayman, supra*), habeas corpus has become of less practical significance for federal prisoners.

decisions by the lower federal courts and did not restore it for almost 20 years.[18] Moreover, it was not until this century that the Fourteenth Amendment was deemed to apply some of the safeguards of criminal procedure contained in the Bill of Rights to the States. Yet during the period of the withdrawal of the Supreme Court's jurisdiction of habeas appeals, the lower federal courts did not hesitate to discharge state prisoners whose convictions rested on unconstitutional statutes or had otherwise been obtained in derogation of constitutional rights.[19] After its jurisdiction had been restored, this Court adhered to the pattern set by the lower federal courts and to the principles enunciated in *Ex parte Siebold* and the other federal-prisoner cases.[20] More recently, further applications of the Fourteenth Amendment in state criminal proceedings have led the Court to find correspondingly more numerous occasions upon which federal habeas would lie.[21]

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[18] Act of March 27, 1868, c. 34, § 2, 15 Stat. 44; Act of March 3, 1885, c. 353, 23 Stat. 437. See *Ex parte McCardle*, 7 Wall. 506.

[19] *E. g.*, *Ex parte McCready*, 1 Hughes 598 (Cir. Ct. E. D. Va. 1874); *Ex parte Bridges*, 2 Woods 428 (Cir. Ct. N. D. Ga. 1875); *In re Wong Yung Quy*, 6 Sawyer 237 (Cir. Ct. D. Cal. 1880); *In re Parrott*, 6 *id.*, 349 (Cir. Ct. D. Cal. 1880); *In re Ah Lee*, 6 *id.*, 410 (D. C. D. Ore. 1880); *In re Ah Chong*, 6 *id.*, 451 (Cir. Ct. D. Cal. 1880); *Ex parte Houghton*, 7 Fed. 657, 8 Fed. 897 (D. C. D. Vt. 1881).

[20] *E. g.*, *Ex parte Royall*, 117 U. S. 241; *Wo Lee* v. *Hopkins*, decided with *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Medley, Petitioner*, 134 U. S. 160; *Savage, Petitioner*, 134 U. S. 176; *Minnesota* v. *Barber*, 136 U. S. 313 (disapproved in *Minnesota* v. *Brundage*, 180 U. S. 499); *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624; *In re Rahrer*, 140 U. S. 545; *McElvaine* v. *Brush*, 142 U. S. 155; *Cook* v. *Hart*, 146 U. S. 183; *In re Frederich*, 149 U. S. 70; *Felts* v. *Murphy*, 201 U. S. 123; *Pettibone* v. *Nichols*, 203 U. S. 192; *Frank* v. *Mangum*, 237 U. S. 309, 331; *Lott* v. *Pittman*, 243 U. S. 588.

[21] *E. g.*, *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *House* v. *Mayo*, 324 U. S. 42; *White* v. *Ragen*, 324 U. S. 760; *Dowd* v. *United States ex rel. Cook*, 340 U. S. 206; *Brown*

Mr. Justice Holmes expressed the rationale behind such decisions in language that sums up virtually the whole history of the Great Writ:

> ". . . [*H*]*abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.
>
> "The argument for the appellee in substance is that the trial was in a court of competent jurisdiction . . . . But . . . [w]hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial . . . . We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence." [22]

We do not suggest that this Court has always followed an unwavering line in its conclusions as to the availability

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v. *Allen*, 344 U. S. 443; *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561; *Massey* v. *Moore*, 348 U. S. 105; *Cicenia* v. *Lagay*, 357 U. S. 504; *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276; *Douglas* v. *Green*, 363 U. S. 192; *Rogers* v. *Richmond*, 365 U. S. 534; *Irvin* v. *Dowd*, 366 U. S. 717.

[22] *Frank* v. *Mangum*, 237 U. S. 309, 346–347 (dissenting opinion). The principles advanced by Mr. Justice Holmes in his dissenting opinion in *Frank* were later adopted by the Court in *Moore* v. *Dempsey*, 261 U. S. 86, and have remained the law. See pp. 420–422, *infra*.

of the Great Writ. Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling. *E. g., Ex parte Parks,* 93 U. S. 18; *Ex parte Bigelow,* 113 U. S. 328; *In re Belt,* 159 U. S. 95; *In re Moran,* 203 U. S. 96; *Knewel* v. *Egan,* 268 U. S. 442. Although the remedy extends to federal prisoners held in violation of federal law and not merely of the Federal Constitution, many cases have denied relief upon allegations merely of error of law and not of a substantial constitutional denial. *E. g., Ex parte Parks, supra,* at 20–21; *In re Wight,* 134 U. S. 136, 148; *Harlan* v. *McGourin,* 218 U. S. 442, 448; *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304. Such decisions are not however authorities against applications which invoke the historic office of the Great Writ to redress detentions in violation of fundamental law.[23]

In some of the cases the denial of the remedy on jurisdictional grounds seems to have been chosen in preference to decision of the merits of constitutional claims felt to be tenuous. *E. g., In re Moran, supra; Knewel* v. *Egan, supra; Goto* v. *Lane,* 265 U. S. 393; *United States* v. *Valante,* 264 U. S. 563.[24] And doubtless a powerful influence against the allowance of the remedy to state prisoners

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[23] Obviously in a case of such mere error the fact that this Court had no general appellate jurisdiction, note 26, *infra,* over federal criminal judgments argued with special power against granting relief on habeas.

[24] In *Moran,* the Court passed on the merits of one Fifth Amendment ground tendered by the petitioner but rejected the other—whether petitioner's being compelled to walk up and down before the jury violated the Self-Incrimination Clause of the Fifth—perfunctorily on the basis of lack of habeas jurisdiction to review errors not going to the jurisdiction of the convicting court. In *Knewel* the basis of the habeas petition was a claim of pleading deficiencies and improper venue under state law. Petitioner's assertion that his constitutional rights had been infringed was thus scarcely colorable. The allegations in *Goto* and *Valante* were similarly insubstantial.

flowed from the availability of review of state criminal judgments in this Court as of right. See, *e. g., Andrews* v. *Swartz,* 156 U. S. 272, 276. Before 1916 review of such judgments was not discretionary by writ of certiorari but of right by writ of error.[25] The occasions on which the extraordinary remedy of habeas corpus was indispensable were therefore few, since the practice of the Court was to put the habeas corpus applicant to his writ of error. *E. g., In re Frederich,* 149 U. S. 70; *Bergemann* v. *Backer,* 157 U. S. 655. And when the Court had no general appellate jurisdiction of federal criminal judgments, which was the case until 1891,[26] the writ was sparingly allowed for the reason stated by Chief Justice Marshall in *Ex parte Watkins, supra.* Thus, in *Bigelow* the Court said: "No appeal or writ of error . . . lies to this court. The act of Congress has made the judgment of that court [the Supreme Court of the District of Columbia] conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain." 113 U. S., at 329. The same view is apparent in *Ex parte Parks, supra,* at 20–21; *Ex parte Curtis,* 106 U. S. 371, 375. Cf. *Harlan* v. *McGourin, supra,* 218 U. S., at 448.

Nevertheless, the possibly grudging scope given the Great Writ in such cases is overshadowed by the numerous and varied allegations which this Court has deemed cognizable on habeas, not only in the last decades, but continuously since the fetters of the *Watkins* decision were

[25] See Rev. Stat., 1874, § 709; Act of September 6, 1916, c. 448, § 2, 39 Stat. 726–727; 28 U. S. C. § 1257.

[26] See Act of March 3, 1891, c. 517, § 5, 26 Stat. 827. The review thus provided was by writ of error. This obligatory review was withdrawn by the Act of January 20, 1897, c. 68, 29 Stat. 492; see Frankfurter and Landis, The Business of the Supreme Court (1927), 109–113, although review as of right remained for capital cases until the Act of March 3, 1911, c. 231, §§ 128, 240, 36 Stat. 1133–1134, 1157. See 28 U. S. C. § 1254.

thrown off in *Ex parte Lange*. *E. g., Ex parte Wilson,* 114 U. S. 417 (Fifth Amendment grand jury right); *In re Converse,* 137 U. S. 624 (Due Process Clause of Fourteenth Amendment); *Rogers* v. *Peck,* 199 U. S. 425 (same); *Felts* v. *Murphy,* 201 U. S. 123 (same); *Lott* v. *Pittman,* 243 U. S. 588 (same); *Callan* v. *Wilson,* 127 U. S. 540, 557 (constitutional right to jury trial in federal criminal cases); *Hawaii* v. *Mankichi,* 190 U. S. 197 (same) (by implication); *Arndstein* v. *McCarthy,* 254 U. S. 71 (Self-Incrimination Clause of Fifth Amendment); *Morgan* v. *Devine,* 237 U. S. 632 (double jeopardy); *Andersen* v. *Treat,* 172 U. S. 24 (Sixth Amendment right to counsel); and see decisions cited at notes 17, 20, and 21, *supra.*

And so, although almost 300 years have elapsed since *Bushell's Case,* changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable should not be allowed to obscure the basic continuity in the conception of the writ as the remedy for such imprisonments.

It now remains to consider this principle in the application to the present case. It was settled in *Brown* v. *Allen, supra,* that the use of a coerced confession in a state criminal trial could be challenged in a federal habeas corpus proceeding. Yet actually the principle had been foreshadowed much earlier—indeed, in the very first case in which this Court reversed a state conviction on the ground that coerced confessions had been used in evidence. "That complaint is . . . of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore* v. *Dempsey* . . . . [A]nd the proceeding thus vitiated could be challenged in any appropriate manner." *Brown* v. *Mississippi,* 297 U. S. 278, 286–287. Under the conditions of modern society, Noia's imprisonment, under a

conviction procured by a confession held by the Court of Appeals in *Caminito* v. *Murphy* to have been coerced, and which the State here concedes was obtained in violation of the Fourteenth Amendment, is no less intolerable than was Bushell's under the conditions of a very different society; and habeas corpus is no less the appropriate remedy.

II.

But, it is argued, a different result is compelled by the exigencies of federalism, which played no role in *Bushell's Case*.

We can appraise this argument only in light of the historical accommodation that has been worked out between the state and federal courts respecting the administration of federal habeas corpus. Our starting point is the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386, which first extended federal habeas corpus to state prisoners generally, and which survives, except for some changes in wording, in the present statutory codification. The original Act and the current provisions are set out in an Appendix at the end of this opinion, *post,* pp. 441–445. Although the Act of 1867, like its English and American predecessors, nowhere defines habeas corpus, its expansive language and imperative tone, viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy, would seem to make inescapable the conclusion that Congress was enlarging the habeas remedy as previously understood, not only in extending its coverage to state prisoners, but also in making its procedures more efficacious. In 1867, Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments. Debated and enacted at the very peak of the Radical Republicans' power, see 2 Warren, The Supreme Court in United

States History (1928), 455–497, the measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. Congress seems to have had no thought, thus, that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review by this Court—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged. See *Ex parte Bridges,* 2 Woods 428, 432 (Cir. Ct. N. D. Ga. 1875); *Ex parte McCready,* 1 Hughes 598 (Cir. Ct. E. D. Va. 1874). Compare Rev. Stat., 1874, § 641 (providing for removal to Federal Circuit Court "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State . . . any right secured to him by any law providing for the equal civil rights of citizens of the United States"); *Virginia* v. *Rives,* 100 U. S. 313.

The elaborate provisions in the Act for taking testimony and trying the facts anew in habeas hearings [27] lend support to this conclusion, as does the legislative history of House bill No. 605, which became, with slight changes, the Act of February 5, 1867. The bill was introduced in

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[27] In making provision for the trial of fact on habeas (something that had been left unmentioned in the previous statutes governing federal habeas corpus), the Act of 1867 seems to have restored rather than extended the common-law powers of the habeas judge. For it appears that the common-law doctrine of the incontrovertibility of the truth of the return was subject to numerous exceptions. Hurd, Habeas Corpus (2d ed. 1876), 271; Bacon, Abridgment, Habeas Corpus (Bouvier ed., 1856), B 11.

response to a resolution of the House on December 19, 1865, asking the Judiciary Committee to determine "what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States . . . and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." Cong. Globe, 39th Cong., 1st Sess. 87. The terms in which it was described by its proponent, Representative Lawrence of Ohio, leave little doubt of the breadth of its intended scope: "the effect of . . . [bill No. 605] is to enlarge the privilege of the writ of *hobeas* [*sic*] *corpus,* and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866). This Court, shortly after the passage of the Act, described it in equally broad terms: "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Ex parte McCardle,* 6 Wall. 318, 325–326.

In thus extending the habeas corpus power of the federal courts evidently to what was conceived to be its constitutional limit, the Act of February 5, 1867, clearly enough portended difficult problems concerning the relationship of the state and federal courts in the area of criminal administration. Such problems were not slow to mature. Only eight years after passage of the Act, Mr. Justice Bradley, sitting as Circuit Justice, held that a convicted state prisoner who had not sought any state appellate or collateral remedies could nevertheless win immediate release on federal habeas if he proved the unconstitutionality of his conviction; although the judg-

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ment was not final within the state court system, the federal court had the power to inquire into the legality of the prisoner's detention. *Ex parte Bridges, supra.* Accord, *Ex parte McCready, supra.* This holding flowed inexorably from the clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants, and it was explicitly approved by the full Court in *Ex parte Royall,* 117 U. S. 241, 253, a case in which habeas had been sought in advance of trial. The Court held that even in such a case the federal courts had the *power* to discharge a state prisoner restrained in violation of the Federal Constitution, see 117 U. S., at 245, 250–251, but that ordinarily the federal court should stay its hand on habeas pending completion of the state court proceedings. This qualification plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction, which had attached by reason of the allegedly unconstitutional detention and could not be ousted by what the state court might decide. As well stated in a later case:

> ". . . While the Federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the Federal Constitution or laws, . . . the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with the Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional

> rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the Federal court will remain unimpaired." [28]

These decisions fashioned a doctrine of abstention, whereby full play would be allowed the States in the administration of their criminal justice without prejudice to federal rights enwoven in the state proceedings. Thus the Court has frequently held that application for a writ of habeas corpus should have been denied "without prejudice to a renewal of the same after the accused had availed himself of such remedies as the laws of the State afforded . . . ." *Minnesota* v. *Brundage*, 180 U. S. 499, 500–501. See also *Ex parte Royall, supra*, at 254. With refinements, this doctrine requiring the exhaustion of state remedies is now codified in 28 U. S. C. § 2254.[29] But its rationale has not changed: "it would be unseemly

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[28] *Cook* v. *Hart*, 146 U. S. 183, 194–195. See, *e. g.*, *Ex parte Fonda*, 117 U. S. 516; *In re Wood*, 140 U. S. 278; *Pepke* v. *Cronan*, 155 U. S. 100; *In re Frederich*, 149 U. S. 70; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Reid* v. *Jones*, 187 U. S. 153; *United States ex rel. Drury* v. *Lewis*, 200 U. S. 1; *Pettibone* v. *Nichols*, 203 U. S. 192; *Ex parte Simon*, 208 U. S. 144; *Johnson* v. *Hoy*, 227 U. S. 245.

[29] "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

This section was added in the revision of the Judicial Code in 1948. The Reviser's Note reads: "This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, . . . 321 U. S. 114 . . . .)"

in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation . . . . Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr* v. *Burford,* 339 U. S. 200, 204. The rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power." *Bowen* v. *Johnston,* 306 U. S. 19, 27. Cf. *Stack* v. *Boyle,* 342 U. S. 1; *Frisbie* v. *Collins,* 342 U. S. 519; *Douglas* v. *Green,* 363 U. S. 192.

The reasoning of *Ex parte Royall* and its progeny suggested that after the state courts had decided the federal question on the merits against the habeas petitioner, he could return to the federal court on habeas and there relitigate the question, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent. And so this Court has consistently held, save only in *Frank* v. *Mangum,* 237 U. S. 309. In that case, the State Supreme Court had rejected on the merits petitioner's contention of mob domination at his trial, and this Court held that habeas would not lie because the State had afforded petitioner corrective process. However, the decision seems grounded not in any want of power, for the Court described the federal courts' habeas powers in the broadest terms, 237 U. S., at 330–331, but rather in a narrow conception of due process in state criminal justice. The Court felt that so long as Frank had had an opportunity to challenge his conviction in some impartial tribunal, such as the State Supreme Court, he had been afforded the process he was constitutionally due.

The majority's position in *Frank*, however, was substantially repudiated in *Moore* v. *Dempsey*, 261 U. S. 86, a case almost identical in all pertinent respects to *Frank*. Mr. Justice Holmes, writing for the Court in *Moore* (he had written the dissenting opinion in *Frank*), said: "if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; . . . [if] the State Courts failed to correct the wrong, . . . perfection in the machinery for correction . . . can[not] prevent this Court from securing to the petitioners their constitutional rights." 261 U. S., at 90–91. It was settled in *Moore*, restoring what evidently had been the assumption until *Frank*, see, *e. g.*, *Cook* v. *Hart*, 146 U. S. 183, 194–195; and cases cited in note 28, *supra*, that the state courts' view of the merits was not entitled to conclusive weight. We have not deviated from that position.[30] Thus, we

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[30] See, *e. g.*, *Ex parte Hawk*, 321 U. S. 114, 118; *Jennings* v. *Illinois*, 342 U. S. 104, 109; *Brown* v. *Allen*, 344 U. S. 443; *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561; *Leyra* v. *Denno*, 347 U. S. 556; *Chessman* v. *Teets*, 350 U. S. 3; *Thomas* v. *Arizona*, 356 U. S. 390; *Hawk* v. *Olson*, 326 U. S. 271, 276 (dictum).

The argument has recently been advanced that the *Moore* decision did not in fact discredit the position advanced by the Court in *Frank* v. *Mangum* (that habeas would lie only if the state courts had failed to afford petitioner corrective process), and that this position was first upset in *Brown* v. *Allen*. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 488–500 (1963). The argument would seem untenable in light of certain factors: (1) The opinion of the Court in *Moore*, written by Mr. Justice Holmes, is a virtual paraphrase of his dissenting opinion in *Frank*. (2) The thesis of the *Frank* majority finds no support in other decisions of the Court; though the availability of corrective process is sometimes mentioned as a factor bearing upon grant or denial of federal habeas, such language typically appears in the context of the exhaustion problem; indeed, "available

have left the weight to be given a particular state court adjudication of a federal claim later pressed on habeas substantially in the discretion of the Federal District Court: "the state adjudication carries the weight that federal practice gives to the conclusion of a court . . . of another jurisdiction on federal constitutional issues. It is not *res judicata.*" *Brown* v. *Allen, supra,* at 458 (opinion of Mr. Justice Reed). ". . . [N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." 344 U. S., at 508 (opinion of Mr. Justice Frankfurter). Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad *power* on habeas to hold an evidentiary hearing and determine the facts.[31]

The breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English prac-

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State corrective process" is part of the language of 28 U. S. C. § 2254. See, *e. g., White* v. *Ragen,* 324 U. S. 760, 764. (3) None of the opinions in *Brown* v. *Allen* even remotely suggests that the Court was changing the existing law in allowing coerced confessions and racial discrimination in jury selection to be challenged on habeas notwithstanding state court review of the merits of these constitutional claims.

[31] See *Brown* v. *Allen,* 344 U. S. 443, 478 (opinion of Mr. Justice Reed), 506 (opinion of Mr. Justice Frankfurter). We accompanied our denial of certiorari in *Rogers* v. *Richmond,* 357 U. S. 220, with an opinion in which we said: ". . . while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony." The *Rogers* case was ultimately decided on other grounds. 365 U. S. 534.

tice.[32] As put by Mr. Justice Holmes in his dissenting opinion in *Frank* v. *Mangum, supra,* at 348: "If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above." It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that *res judicata* is inapplicable in habeas proceedings, see, *e. g., Darr* v. *Burford,* 339 U. S. 200, 214; *Salinger* v. *Loisel,* 265 U. S. 224, 230; *Frank* v. *Mangum,* 237 U. S. 309, 334; Church, Habeas Corpus (1884), § 386, is really but an instance of the larger principle that void judgments may be collaterally impeached. Restatement, Judgments (1942), §§ 7, 11; Note, Res Judicata, 65 Harv. L. Rev. 818, 850 (1952). Cf. *Windsor* v. *McVeigh,* 93 U. S. 274, 282–283. So also, the traditional characterization of the writ of habeas corpus as an original (save perhaps when issued by this Court [33]) civil remedy for the enforcement of the right to personal liberty,[34] rather than

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[32] Lord Herschell, in *Cox* v. *Hakes,* [1890] 15 A. C. 506, 527–528 (H. L.), described the English practice as follows: "No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. . . . I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful." This practice has lately been changed by statute, Administration of Justice Act, 1960, 8 & 9 Eliz. II, c. 65, § 14 (2).

[33] See note 16, *supra.*

[34] See *In re Frederich,* 149 U. S. 70, 75–76; *Ex parte Clarke,* 100 U. S. 399; *Ex parte Tom Tong,* 108 U. S. 556; *Kurtz* v. *Moffitt,* 115

as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before. This is not to say that a state criminal judgment resting on a constitutional error is void for all purposes. But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Despite the Court's refusal to give binding weight to state court determinations of the merits in habeas, it has not infrequently suggested that where the state court declines to reach the merits because of a procedural default, the federal courts may be foreclosed from granting the relief sought on habeas corpus.[35] But the Court's

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U. S. 487; *Fisher* v. *Baker*, 203 U. S. 174; *Riddle* v. *Dyche*, 262 U. S. 333. "[T]he writ of habeas corpus is a new suit brought by the petitioner to enforce a civil right, which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty, and not by the government to punish for his crime. The judicial proceeding, under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. It is not a proceeding in the original action." 1 Bailey, Habeas Corpus and Special Remedies (1913), § 4.

[35] See *In re Wood*, 140 U. S. 278; *Markuson* v. *Boucher*, 175 U. S. 184; *Davis* v. *Burke*, 179 U. S. 399; *In re Lincoln*, 202 U. S. 178; *Ex parte Spencer*, 228 U. S. 652; *Goto* v. *Lane*, 265 U. S. 393; *Frank* v. *Mangum*, 237 U. S. 309, 343; *Jennings* v. *Illinois*, 342 U. S. 104; *Darr* v. *Burford*, 339 U. S. 200; *Cicenia* v. *Lagay*, 357 U. S. 504, 507–508, n. 2; *Brown* v. *Allen*, 344 U. S. 443, 503 (opinion of Frankfurter, J.); *Daniels* v. *Allen*, decided with *Brown* v. *Allen*, *supra*, at 485–487.

In *Sunal* v. *Large*, 332 U. S. 174, the Court held that federal prisoners who did not appeal their convictions could not be released on habeas. However, the Court expressly excluded errors so grave that they "cross the jurisdictional line," 332 U. S., at 179, and implied that the claimed error was not even of constitutional dimension, *id.*, at 182–183. See pp. 411–412, *supra*.

practice in this area has been far from uniform,[36] and even greater divergency has characterized the practice of the lower federal courts.[37]

For the present, however, it suffices to note that rarely, if ever, has the Court predicated its deference to state procedural rules on a want of *power* to entertain a habeas application where a procedural default was committed by the defendant in the state courts. Typically, the Court, like the District Court in the instant case, has approached the problem as an aspect of the rule requiring exhaustion of state remedies, which is not a rule distributing power as between the state and federal courts. See pp. 417–420, *supra*. That was the approach taken in the *Spencer* and *Daniels* decisions, the most emphatic in their statement of deference to state rules of procedure. The same considerations of comity that led the Court to refuse relief to one who had not yet availed himself of his state remedies likewise prompted the refusal of relief to one who had inexcusably failed to tender the federal questions to the state courts. Either situation poses a threat to the orderly administration of criminal justice that ought if possible to be averted. Whether in fact the conduct of a Spencer or

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[36] *Moore* v. *Dempsey*, 261 U. S. 86, is the most striking example of the Court's seeming refusal to give effect to a state procedural ground, though the Court's language is ambiguous. 261 U. S., at 91–92.

[37] Compare, *e. g.*, *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (C. A. 2d Cir. 1957); *Whitley* v. *Steiner*, 293 F. 2d 895 (C. A. 4th Cir. 1961); *United States ex rel. Stewart* v. *Ragen*, 231 F. 2d 312 (C. A. 7th Cir. 1956); and *United States ex rel. Dopkowski* v. *Randolph*, 262 F. 2d 10 (C. A. 7th Cir. 1958), with, *e. g.*, *Ex parte Houghton*, 7 Fed. 657, 664, 8 Fed. 897, 903 (D. C. D. Vt. 1881); *Pennsylvania* v. *Cavell*, 157 F. Supp. 272 (D. C. W. D. Pa. 1957), aff'd mem., 254 F. 2d 816 (C. A. 3d Cir. 1958); *Johns* v. *Overlade*, 122 F. Supp. 921 (D. C. N. D. Ind. 1953); *Morrison* v. *Smyth*, 273 F. 2d 544, 547 (C. A. 4th Cir. 1960); *United States ex rel. Rooney* v. *Ragen*, 158 F. 2d 346, 352 (C. A. 7th Cir. 1946).

a Daniels was inexcusable in this sense is beside the point, as is the arguable illogicality of turning a rule of timing into a doctrine of forfeitures. The point is that the Court, by relying upon a rule of discretion, avowedly flexible, *Frisbie* v. *Collins,* 342 U. S. 519, yielding always to "exceptional circumstances," *Bowen* v. *Johnston,* 306 U. S. 19, 27, has refused to concede jurisdictional significance to the abortive state court proceeding.

III.

We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of a great constitutional privilege and the requirements of the federal system. Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation. At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State pro-

cedural rules plainly must yield to this overriding federal policy.

A number of arguments are advanced against this conclusion. One, which concedes the breadth of federal habeas power, is that a state prisoner who forfeits his opportunity to vindicate federal defenses in the state court has been given all the process that is constitutionally due him, and hence is not restrained contrary to the Constitution. But this wholly misconceives the scope of due process of law, which comprehends not only the right to be heard but also a number of explicit procedural rights—for example, the right not to be convicted upon evidence which includes one's coerced confession—drawn from the Bill of Rights. As Mr. Justice Holmes explained in *Moore* v. *Dempsey,* see pp. 421–422, *supra,* a mob-dominated trial is no less a denial of due process because the State Supreme Court believed that the trial was actually a fair one. *A fortiori,* due process denied in the proceedings leading to conviction is not restored just because the state court declines to adjudicate the claimed denial on the merits.

A variant of this argument is that if the state court declines to entertain a federal defense because of a procedural default, then the prisoner's custody is actually due to the default rather than to the underlying constitutional infringement, so that he is not in custody in violation of federal law.[38] But this ignores the important difference between rights and particular remedies. Cf. *Douglas* v. *Jeannette,* 319 U. S. 157; *Stefanelli* v. *Minard,* 342 U. S.

[38] This argument derives no support from the statutory specification of "custody," 28 U. S. C. § 2241 (c) (3). Of course custody in the sense of restraint of liberty is a prerequisite to habeas, for the only remedy that can be granted on habeas is some form of discharge from custody. *McNally* v. *Hill,* 293 U. S. 131; *Medley, Petitioner,* 134 U. S. 160, 173–174; *Wales* v. *Whitney,* 114 U. S. 564, 571.

117; *Wolf* v. *Colorado,* 338 U. S. 25. A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds. But a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured. Would Noia's failure to appeal have precluded him from bringing an action under the Civil Rights Acts against his inquisitors? The Act of February 5, 1867, like the Civil Rights Acts, was intended to furnish an independent, collateral remedy for certain privations of liberty. The conceptual difficulty of regarding a default as extinguishing the substantive right is increased where, as in Noia's case, the default forecloses extraordinary remedies. In what sense is Noia's custody not in violation of federal law simply because New York will not allow him to challenge it on *coram nobis* or on delayed appeal? But conceptual problems aside, it should be obvious that to turn the instant case on the meaning of "custody in violation of the Constitution" is to reason in circles. The very question we face is how completely federal remedies fall with the state remedies; when we have answered this, we shall know in what sense custody may be rendered lawful by a supervening procedural default.

It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds. See, *e. g., NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449; *Fox Film Corp.* v. *Muller,* 296 U. S. 207. Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 85–87, denied this Court power to base the reversal of a state court decision on any error other "than such as . . . immediately respects . . . questions of validity or construction of the said [Federal] constitution, treaties, statutes, commissions, or authorities in dispute." The deletion of the express restriction by the Judiciary

Act of February 5, 1867, c. 28, § 2, 14 Stat. 386–387, did not enlarge this Court's power in that regard. *Murdock* v. *Memphis,* 20 Wall. 590. *Murdock* was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds. See, *e. g., Herb* v. *Pitcairn,* 324 U. S. 117; *Davis* v. *Wechsler,* 263 U. S. 22; *Ward* v. *Board of County Comm'rs,* 253 U. S. 17. Thus, a default such as Noia's, if deemed adequate and independent (a question on which we intimate no view), would cut off review by this Court of the state *coram nobis* proceeding in which the New York Court of Appeals refused him relief. It is contended that it follows from this that the remedy of federal habeas corpus is likewise cut off.[39]

The fatal weakness of this contention is its failure to recognize that the adequate state-ground rule is a function of the limitations of *appellate* review. Most of the opinion in the *Murdock* case is devoted to demonstrating the Court's lack of jurisdiction on direct review to decide questions of state law in cases also raising federal questions. It followed from this holding that if the state question was dispositive of the case, the Court could not decide the federal question. The federal question was moot; nothing turned on its resolution. And so we have held that the adequate state-ground rule is a consequence

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[39] See *Irvin* v. *Dowd,* 359 U. S. 394, 410, 412–413 (dissenting opinions); Hart, note 4, *supra.* Professor Hart seems to concede, however, that the conventional adequate state-ground rule would have to be modified to do service in habeas, 73 Harv. L. Rev., at 112, n. 81, and further opines that the Court has "vacillated" in its application of the rule even in conventional situations. *Id.,* at 116. It has been said by others also that the adequate state-ground rule has not been clearly articulated or consistently applied by this Court. *E. g.,* Note, 74 Harv. L. Rev. 1375, 1394 (1961); Comment, 61 Col. L. Rev. 255, 256, 277 (1961). In any event, no habeas decision has been found which expressly rests upon it. Thus, to apply the rule in habeas would be to set sail on quite uncharted seas.

of the Court's obligation to refrain from rendering advisory opinions or passing upon moot questions.[40]

But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. The entire course of decisions in this Court elaborating the rule of exhaustion of state remedies is wholly incompatible with the proposition that a state court *judgment* is required to confer federal habeas jurisdiction. And the broad power of the federal courts under 28 U. S. C. § 2243 summarily to hear the application and to "determine the facts, and dispose of the matter as law and justice require," is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal

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[40] "The reason [for the adequate state-ground rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126. See Note, note 39, *supra*, at 1379 and n. 32.

We need not decide whether the adequate state-ground rule is constitutionally compelled or merely a matter of the construction of the statutes defining this Court's appellate review. *Murdock* itself was predicated on statutory construction, and the present statute governing our review of state court decisions, 28 U. S. C. § 1257, limited as it is to "*judgments or decrees* rendered by the highest court of a State in which a decision could be had" (italics supplied), provides ample statutory warrant for our continued adherence to the principles laid down in *Murdock*.

court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner. *Medley, Petitioner,* 134 U. S. 160, 173.

To be sure, this may not be the entire answer to the contention that the adequate state-ground principle should apply to the federal courts on habeas corpus as well as to the Supreme Court on direct review of state judgments. The *Murdock* decision may be supported not only by the factor of mootness, but in addition by certain characteristics of the federal system. The first question the Court had to decide in *Murdock* was whether it had the power to review state questions in cases also raising federal questions. It held that it did not, thus affirming the independence of the States in matters within the proper sphere of their lawmaking power from federal judicial interference. For the federal courts to refuse to give effect in habeas proceedings to state procedural defaults might conceivably have some effect upon the States' regulation of their criminal procedures. But the problem is crucially different from that posed in *Murdock* of the federal courts' deciding questions of substantive state law. In Noia's case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal. Cf. *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359. That is not to say that the States have not a substantial interest in exacting compliance with their procedural rules from criminal defendants asserting federal defenses. Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such procedure. But that state interest "competes . . . against an ideal . . . [the] ideal of fair procedure." Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 5 (1956).

And the only concrete impact the assumption of federal habeas jurisdiction in the face of a procedural default has on the state interest we have described, is that it prevents the State from closing off the convicted defendant's last opportunity to vindicate his constitutional rights, thereby punishing him for his default and deterring others who might commit similar defaults in the future.

Surely this state interest in an airtight system of forfeitures is of a different order from that, vindicated in *Murdock,* in the autonomy of state law within the proper sphere of its substantive regulation. The difference is illustrated in the settled principle that if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas. *McNally* v. *Hill,* 293 U. S. 131. For the federal court to order the release of such a prisoner would be to nullify a proceeding—that under the first count—wholly outside the orbit of federal interest. Contrariwise, the only count under which Noia was convicted and imprisoned is admitted to be vitiated by force of federal law.

Certainly this Court has differentiated the two situations in its application of the adequate state-ground rule. While it has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights.[41] That the

[41] See, *e. g., Staub* v. *Baxley,* 355 U. S. 313; *Williams* v. *Georgia,* 349 U. S. 375, 389; *New York Cent. R. Co.* v. *New York & Pa. Co.,* 271 U. S. 124; *Davis* v. *Wechsler,* 263 U. S. 22; *Carter* v. *Texas,* 177 U. S. 442; Note, 74 Harv. L. Rev. 1375, 1388–1391 (1961); Comment, 61 Col. L. Rev. 255 (1961). "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler, supra,* at 24. (Mr. Justice Holmes.)

Court nevertheless ordinarily gives effect to state procedural grounds may be attributed to considerations which are peculiar to the Court's role and function and have no relevance to habeas corpus proceedings in the Federal District Courts: the unfamiliarity of members of this Court with the minutiae of 50 States' procedures; the inappropriateness of crowding our docket with questions turning wholly on particular state procedures; the web of rules and statutes that circumscribes our appellate jurisdiction; and the inherent and historical limitations of such a jurisdiction.

A practical appraisal of the state interest here involved plainly does not justify the federal courts' enforcing on habeas corpus a doctrine of forfeitures under the guise of applying the adequate state-ground rule. We fully grant, see p. 438, *infra,* that the exigencies of federalism warrant a limitation whereby the federal judge has the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts. Surely no stricter rule is a realistic necessity. A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. See *Rogers* v. *Richmond,* 365 U. S. 534, 547–548. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in

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the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution. For these several reasons we reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.

What we have said substantially disposes of the further contention that 28 U. S. C. § 2254 embodies a doctrine of forfeitures and cuts off relief when there has been a failure to exhaust state remedies no longer available at the time habeas is sought. This contention is refuted by the language of the statute and by its history.[42] It was enacted to codify the judicially evolved rule of exhaustion, particularly as formulated in *Ex parte Hawk*, 321 U. S. 114. See the review of the legislative history in *Darr* v. *Burford*, 339 U. S. 200, 211–213. Nothing in the *Hawk* opinion points to past exhaustion. Very little support can be found in the long course of previous deci-

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[42] See note 29, *supra*. Plainly, the words of § 2254 favor a construction limited to presently available remedies. Reitz, *supra*, n. 4, at 1365. The only two decisions of this Court prior to 1948 in which past exhaustion was strongly suggested were *Ex parte Spencer*, 228 U. S. 652, and *Frank* v. *Mangum*, 237 U. S. 309, 343. The latter, of course, was substantially overruled in *Moore* v. *Dempsey*, the language of which does not support a notion of forfeitures. See note 36, *supra*. On the other hand, *Mooney* v. *Holohan*, 294 U. S. 103, is typical of decisions plainly implying a rule limited to presently available remedies: "before this Court is asked to issue a writ of *habeas corpus*, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open. . . .

"Accordingly, leave to file the petition is denied, but without prejudice." 294 U. S., at 115.

sions by this Court elaborating the rule of exhaustion for the proposition that it was regarded at the time of the revision of the Judicial Code as jurisdictional rather than merely as a rule ordering the state and federal proceedings so as to eliminate unnecessary federal-state friction. There is thus no warrant for attributing to Congress, in the teeth of the language of § 2254, intent to work a radical innovation in the law of habeas corpus. We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court.[43] Parenthetically, we note that our holding in *Irvin* v. *Dowd,* 359 U. S. 394, is not inconsistent. Our holding there was that since the Indiana Supreme Court had reached the merits of Irvin's federal claim, the District Court was not barred by § 2254 from determining the merits of Irvin's constitutional contentions.

## IV.

Noia timely sought and was denied certiorari here from the adverse decision of the New York Court of Appeals on his *coram nobis* application, and therefore the case does not necessarily draw in question the continued vitality of the holding in *Darr* v. *Burford, supra,* that a state prisoner must ordinarily seek certiorari in this Court as a precondition of applying for federal habeas corpus. But what we hold today necessarily overrules *Darr* v. *Burford* to the extent it may be thought to have barred a state prisoner from federal habeas relief if he had failed timely to seek certiorari in this Court from an adverse state decision. Furthermore, our decision today affects all procedural hurdles to the achievement of swift and imperative justice on habeas corpus, and because the

[43] By thus stating the rule, we do not mean to disturb the settled principles governing its application in cases of presently available state remedies. See, *e. g., Brown* v. *Allen,* 344 U. S. 443, 447–450.

hurdle erected by *Darr* v. *Burford* is unjustifiable under the principles we have expressed, even insofar as it may be deemed merely an aspect of the statutory requirement of present exhaustion, that decision in that respect also is hereby overruled.

The soundness of the decision was questioned from the beginning. See Pollock, Certiorari and Habeas Corpus, 42 J. of Crim. L. 356, 357–358, n. 15, 364 (1951). Section 2254 speaks only of "remedies available in the courts of the State." Nevertheless, the Court in *Darr* v. *Burford* put a gloss upon these words to include petitioning for certiorari in this Court, which is not the court of any State, among the remedies that an applicant must exhaust before proceeding in federal habeas corpus. It is true that before the enactment of § 2254 the Court had spoken of the obligation to seek review in this Court before applying for habeas. *E. g., Baker* v. *Grice,* 169 U. S. 284; *Markuson* v. *Boucher,* 175 U. S. 184. But that was at the time when review of state criminal judgments in this Court was by writ of error. Review here was thus a stage of the normal appellate process. The writ of certiorari, which today provides the usual mode of invoking this Court's appellate jurisdiction of state criminal judgments, "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19 (1). Review on certiorari therefore does not provide a normal appellate channel in any sense comparable to the writ of error.

It is also true that *Ex parte Hawk,* 321 U. S. 114, a decision cited in the Reviser's Note to § 2254, intimated in *dictum* that exhaustion might comprehend seeking certiorari here. 321 U. S., at 116–117. But that passing reference cannot be exalted into an attribution to Congress of a design patently belied by the unequivocal statutory language.

The rationale of *Darr* v. *Burford* emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience. On the contrary the requirement of *Darr* v. *Burford* has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes. The goal of prompt and fair criminal justice has been impeded because in the overwhelming number of cases the applications for certiorari have been denied for failure to meet the standard of Rule 19. And the demands upon our time in the examination and decision of the large volume of petitions which fail to meet that test have unwarrantably taxed the resources of this Court. Indeed, it has happened that counsel on oral argument has confessed that the record was insufficient to justify our consideration of the case but that he had felt compelled to make the futile time-consuming application in order to qualify for proceeding in a Federal District Court on habeas corpus to make a proper record. *Bullock* v. *South Carolina,* 365 U. S. 292. And so in a number of cases the Court has apparently excused compliance with the requirement. See, *e. g., Weston* v. *Sigler,* 361 U. S. 37; *Bailey* v. *Arkansas,* 358 U. S. 869; *Poret* v. *Sigler,* 355 U. S. 60; *Massey* v. *Moore,* 348 U. S. 105. Cf. *Thomas* v. *Arizona,* 356 U. S. 390, 392, n. 1. The same practice has sometimes been followed in the Federal District Courts. See Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. of Pa. L. Rev. 461, 499 (1960).

Moreover, comity does not demand that such a price in squandered judicial resources be paid; the needs of comity are adequately served in other ways. The requirement that the habeas petitioner exhaust state court rem-

edies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction. And the availability to the States of eventual review on certiorari of such decisions of lower federal courts as may grant relief is always open. Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide.

V.

Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi,* 344 U. S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U. S. 458, 464—"an intentional relinquishment or abandonment of a known right or privilege"—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price* v. *Johnston,* 334 U. S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.[44] Cf. *Carnley* v. *Cochran,* 369 U. S. 506, 513–517; *Moore* v. *Michigan,* 355 U. S. 155, 162–165. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. *E. g., Rice* v. *Olson,* 324 U. S. 786.

The application of the standard we have adumbrated to the facts of the instant case is not difficult. Under no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate by-passing of the state court system. For Noia to have appealed

[44] To the extent that any decisions of this Court may be read to suggest a standard of discretion in federal habeas corpus proceedings different from what we lay down today, such decisions shall be deemed overruled to the extent of any inconsistency.

in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. See, *e. g., Palko* v. *Connecticut,* 302 U. S. 319. He declined to play Russian roulette in this fashion. This was a choice by Noia not to appeal, but under the circumstances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures. This is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found. Each case must stand on its facts. In the instant case, the language of the judge in sentencing Noia, see note 3, *supra,* made the risk that Noia, if reconvicted, would be sentenced to death, palpable and indeed unusually acute.

## VI.

It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure. Our decision today swings open no prison gates. Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus.[45] Those few who are

[45] A study in 1958 by the Administrative Office of the United States Courts revealed that in the preceding nine years, a total of 24 federal habeas corpus petitioners had won release from state penitentiaries. It should be borne in mind that the typical order of the District Court in such circumstances is a conditional release, permitting the State to rearrest and retry the petitioner without actually discharging him from custody. But the study does not show what number were successfully retried or reconvicted by the state

ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy.

*Affirmed.*

## APPENDIX TO OPINION OF THE COURT.

The Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386:

. . . [T]he several courts of the United States, and the several justices and judges of such courts, within their

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authorities. Report No. 2228 on Habeas Corpus of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 28. The informativeness of this study has been questioned. Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. of Pa. L. Rev. 461, 479 and n. 98 (1960). Professor Reitz, from his study of reported opinions, suggests that at least 39 habeas petitioners were successful in the 10 years preceding 1960, at least some of whom (it is not known how many), however, were later retried and reconvicted. *Id.*, at 481.

respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the

material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

28 U. S. C. § 2241:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

. . . . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

. . . . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

28 U. S. C. § 2243:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

MR. JUSTICE CLARK, dissenting.

I agree fully with and join the opinion of my Brother HARLAN. Beyond question the federal courts until today have had no power to release a prisoner in respondent Noia's predicament, there being no basis for such power in either the Constitution or the statute. But the Court today in releasing Noia makes an "abrupt break" not only with the Constitution and the statute but also with its past decisions, disrupting the delicate balance of federalism so foremost in the minds of the Founding Fathers and so uniquely important in the field of law enforcement. The short of it is that Noia's incarceration rests entirely on an adequate and independent state ground—namely, that he knowingly failed to perfect any appeal from his conviction of murder. While it may be that the Court's "decision today swings open no prison gates," the Court must admit in all candor that it effectively swings closed the doors of justice in the face of the State, since it certainly cannot prove its case 20 years after the fact. In view of this unfortunate turn of events, it appears important that we canvass the consequences of today's action on state law enforcement.

First, there can be no question but that a rash of new applications from state prisoners will pour into the federal courts, and 98% of them will be frivolous, if history is any guide.[1] This influx will necessarily have an adverse effect upon the disposition of meritorious applications, for,

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[1] In the 12-year period from 1946 to 1957 the petitioners were successful in 1.4% of the cases. H. R. Rep. No. 548, 86th Cong., 1st Sess. 37.

as my Brother Jackson said, they will "be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (concurring opinion). In fact, the courts are already swamped with applications which cannot, because of sheer numbers, be given more than cursory attention.[2]

Second, the effective administration of criminal justice in state courts receives a staggering blow. Habeas corpus is in effect substituted for appeal, seriously disturbing the orderly disposition of state prosecutions and jeopardizing the finality of state convictions in disregard of the States' comprehensive procedural safeguards which, until today, have been respected by the federal courts. Essential to the administration of justice is the prompt enforcement of judicial decrees. After today state judgments will be relegated to a judicial limbo, subject to federal collateral attack—as here—a score of years later despite a defendant's willful failure to appeal.

The rights of the States to develop and enforce their own judicial procedures, consistent with the Fourteenth Amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are

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[2] The increase in number of habeas corpus applications filed in Federal District Courts by state prisoners is illustrated by the following figures:

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|---|---|
| 1941 | 127 |
| 1945 | 536 |
| 1950 | 560 |
| 1955 | 660 |
| 1960 | 872 |
| 1961 | 906 |
| 1962 | 1,232 |

1962 and 1959 Annual Reports, Administrative Office of U. S. Courts, pp. II–23 and 109, respectively.

today attenuated if not obliterated in the name of a victory for the "struggle for personal liberty." But the Constitution comprehends another struggle of equal importance and places upon our shoulders the burden of maintaining it—the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: "One more such victory . . . , and we are utterly undone."

These considerations have been of great concern to the Judicial Conference of the United States, which has frequently sought to have Congress repair the judicial loopholes in federal habeas corpus for state prisoners.[3] Likewise, the Conference of Chief Justices at its annual meeting has officially registered its dismay,[4] as has the National Association of Attorneys General.[5] Proposed legislation sponsored by one or more of these groups has passed in the House in three separate sessions, but inaction by the Senate caused each bill to die on the vine.[6]

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[3] See Report of the Committee on Habeas Corpus, Judicial Conference of the United States, March 14, 1959, reprinted in H. R. Rep. No. 548, 86th Cong., 1st Sess. 15–20.

[4] See Report of the Habeas Corpus Committee of the Conference of Chief Justices, August 14, 1954, reprinted in H. R. Rep. No. 1293, 85th Cong., 2d Sess. 6–10.

[5] See Resolution of National Association of Attorneys General, reprinted in Hearings on H. R. 6742, H. R. 4958, H. R. 3216 and H. R. 2269 before Subcommittee 3 of the House Judiciary Committee, 86th Cong., 1st Sess. 44.

[6] See H. R. Rep. No. 548, 86th Cong., 1st Sess. 4; H. R. 3216 (proposed by the Judicial Conference) was passed by the House, 105 Cong. Rec. 14637, and referred to the Senate Judiciary Committee, 105 Cong. Rec. 14689, but was not reported by that Committee. It was introduced again in the Eighty-seventh Congress as H. R. 466 and was referred to the House Judiciary Committee, 107 Cong. Rec. 45, but no further action is recorded.

Those proposals apparently were sparked by our decision in *Brown* v. *Allen, supra,*[7] but the Court today goes far beyond that decision by negating its companion case, *Daniels* v. *Allen,* 344 U. S. 443, 482–487 (1953). While I have heretofore opposed such legislation, I must now admit that it may be the only alternative in restoring the writ of habeas corpus to its proper place in the judicial system. That place is one of great importance—a remedy against illegal restraint—but it is not a substitute for or an alternative to appeal, nor is it a burial ground for valid state procedures.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has rendered in a long time.

Section 2241 of the Judicial Code, 28 U. S. C. § 2241, entitled "Power to grant writ," which is part of the federal habeas corpus statute, provides among other things:

> "(c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> . . . . .
>
> "(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

I dissent from the Court's opinion and judgment for the reason that the federal courts have no *power,* statutory or constitutional, to release the respondent Noia from state detention. This is because his custody by New York does not violate any federal right, since it is pursuant to a conviction whose validity rests upon an adequate and independent state ground which the federal courts are required to respect.

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[7] See Report of the Committee on Habeas Corpus, note 3, *supra,* at 16.

A full exposition of the matter is necessary, and I believe it will justify the statement that in what it does today the Court has turned its back on history and struck a heavy blow at the foundations of our federal system.

## I.

### DEPARTURE FROM HISTORY.

The history of federal habeas corpus jurisdiction, I believe, leaves no doubt that today's decision constitutes a square rejection of long-accepted principles governing the nature and scope of the Great Writ.[1]

*Habeas corpus ad subjiciendum* is today, as it has always been, a fundamental safeguard against unlawful custody. The importance of this prerogative writ, requiring the body of a person restrained of liberty to be brought before the court so that the lawfulness of the restraint may be determined, was recognized in the Constitution,[2] and the first Judiciary Act gave the federal courts authority to issue the writ "agreeable to the principles and usages of law."[3] Although the wording of earlier statutory provisions has been changed, the basic question before the court to which the writ is addressed has always been the same: in the language of the present statute, on the books since 1867, is the detention complained of "in violation of the Constitution or laws or treaties of the United States"? *Supra*, p. 448.

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[1] For a broad range of views, see the analytical discussions of the development of federal habeas corpus jurisdiction in Hart, Foreword, 73 Harv. L. Rev. 84; Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315; Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423; and Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441.

[2] U. S. Const., Art. I, § 9, cl. 2.

[3] Section 14 of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 81–82.

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Detention can occur in many contexts, and in each the scope of judicial inquiry will differ. Thus a child may be detained by a parent, an alien excluded by an immigration official, or a citizen arrested by a policeman and held without being brought to a magistrate. But the custody with which we are here concerned is that resulting from a judgment of criminal conviction and sentence by a court of law. And the question before us is the circumstances under which that custody may be held to be inconsistent with the commands of the Federal Constitution. What does history show?

1. *Pre-1915 period.*—The formative stage of the development of habeas corpus jurisdiction may be said to have ended in 1915, the year in which *Frank* v. *Mangum,* 237 U. S. 309, was decided. During this period the federal courts, on applications for habeas corpus complaining of detention pursuant to a judgment of conviction and sentence, purported to examine *only* the jurisdiction of the sentencing tribunal. In the leading case of *Ex parte Watkins,* 3 Pet. 193, the Court stated:

> "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." 3 Pet., at 203.

Many subsequent decisions, dealing with both state and federal prisoners, and involving both original applications to this Court for habeas corpus and review of lower court decisions, reaffirmed the limitation of the writ to consideration of the sentencing court's jurisdiction over the person of the defendant and the subject matter of the suit. *E. g., Ex parte Parks,* 93 U. S. 18; *Andrews* v. *Swartz,* 156 U. S. 272; *In re Belt,* 159 U. S. 95; *In re Moran,* 203 U. S. 96.

The concept of jurisdiction, however, was subjected to considerable strain during this period, and the strain was

not lessened by the fact that until the latter part of the last century, federal criminal convictions were not generally reviewable by the Supreme Court.[4] The expansion of the definition of jurisdiction occurred primarily in two classes of cases: (1) those in which the conviction was for violation of an allegedly unconstitutional statute, and (2) those in which the Court viewed the detention as based on some claimed illegality in the sentence imposed, as distinguished from the judgment of conviction. An example of the former is *Ex parte Siebold,* 100 U. S. 371, in which the Court considered on its merits the claim that the acts under which the indictments were found were unconstitutional, reasoning that "[a]n unconstitutional law is void, and is as no law," and therefore "if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." 100 U. S., at 376–377.[5] An example of the latter is *Ex parte Lange,* 18 Wall. 163, in which this Court held that if a valid sentence had been carried out, and if the governing statute permitted only one sentence, the sentencing judge lacked jurisdiction to impose further punishment:

> "[W]hen the prisoner . . . by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." 18 Wall., at 176.[6]

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[4] The statutory development relating to review of criminal cases by the Supreme Court is discussed in Bator, *supra,* note 1, at 473, n. 75.

[5] See also, *e. g., Ex parte Jackson,* 96 U. S. 727; *Ex parte Yarbrough,* 110 U. S. 651; *Minnesota* v. *Brundage,* 180 U. S. 499.

[6] See also, *e. g., Ex parte Wilson,* 114 U. S. 417; *In re Snow,* 120 U. S. 274; *In re Bonner,* 151 U. S. 242. Compare *Ex parte Bigelow,* 113 U. S. 328.

In addition, there were a few cases during this period in which the Court rejected claims made in habeas corpus, apparently on their

It was also during this period that Congress, in 1867, first made habeas corpus available by statute to prisoners held under state authority. Act of February 5, 1867, c. 28, § 1, 14 Stat. 385. In this 1867 Act the Court now seems to find justification for today's decision, relying on the statement of one of its proponents that the bill was "coextensive with all the powers that can be conferred" on the courts and judges of the United States. Cong. Globe, 39th Cong., 1st Sess. 4151. But neither the statute itself, its legislative history, nor its subsequent interpretation lends any support to the view that habeas corpus jurisdiction since 1867 has been exercisable whether or not the state detention complained of rested on decision of a federal question.

*First,* there is nothing in the language of the Act—which spoke of the availability of the writ to prisoners "restrained of . . . liberty in violation of the constitution . . ."—to suggest that there was any change in the *nature* of the writ as applied to one held pursuant to a judgment of conviction. The language was that typically employed in habeas corpus cases, and, as we have seen, it was not believed that a person so held was restrained in violation of law if the sentencing court had personal and subject matter jurisdiction. Rather, the change accomplished by the language of the Act related to the *classes* of prisoners (in particular, state as well as federal) for whom the writ would be available.

*Second,* what little legislative history there is does not suggest any change in the nature of the writ. The extremely brief debates indicated only a lack of understanding as to what the Act would accomplish, coupled

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merits, without clearly limiting itself to questions of "jurisdiction." See *In re Converse,* 137 U. S. 624; *Felts* v. *Murphy,* 201 U. S. 123. See also Bator, *supra,* note 1, at 484. These cases were infrequent, however, and must be considered as exceptions to the general rules held to be applicable in this formative period.

with an effort by the proponents to make it clear that the purpose was to extend the availability of the writ to persons not then covered; there was no indication of any intent to alter its substantive scope.[7] Thus, less than 20 years after enactment, a congressional committee could say of the 1867 Act that it was not "contemplated by its framers or . . . properly . . . construed to authorize the overthrow of the final judgments of the State courts of general jurisdiction, by the inferior Federal judges . . . ." [8]

*Third,* cases decided under the Act during this period made it clear that the Court did not regard the Act as changing the character of the writ. In considering the lawfulness of the detention of state prisoners, the Court continued to confine itself to questions it regarded as "jurisdictional." See, *e. g., In re Rahrer,* 140 U. S. 545; *Harkrader* v. *Wadley,* 172 U. S. 148; *Pettibone* v. *Nichols,* 203 U. S. 192. And the Court repeatedly held that habeas corpus was not available to a state prisoner to consider errors, even constitutional errors, that did not go to the jurisdiction of the sentencing court. *E. g., In re Wood,* 140 U. S. 278; *Andrews* v. *Swartz,* 156 U. S. 272; *Bergemann* v. *Backer,* 157 U. S. 655.

At the same time, in dealing with applications by state prisoners the Court developed the doctrine of exhaustion of state remedies, a doctrine now embodied in 28 U. S. C. § 2254. In *Ex parte Royall,* 117 U. S. 241, the prisoner had brought federal habeas corpus seeking release from his detention pending a state prosecution, and alleging that the statute under which he was to be tried was void under the Contract Clause. The *power* of the federal

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[7] The remarks of Congressman Lawrence quoted by the majority, *ante,* p. 417, were in response to a suggestion by Congressman LeBlond that the bill would not cover certain civilians in military custody. Cong. Globe, 39th Cong., 1st Sess. 4151. See also *id.,* at 4229.

[8] H. R. Rep. No. 730, 48th Cong., 1st Sess. 5 (1884).

court to act in this case, if the allegations could be established, was clear since under accepted principles the State would have lacked "jurisdiction" to detain the prisoner. But the Court observed that the question of constitutionality would be open to the prisoner at his state trial and, absent any showing of urgency, considerations of comity counseled the exercise of discretion to withhold the writ at this early stage. In subsequent decisions, the Court continued to insist that state remedies be exhausted, even when the applicant alleged a lack of jurisdiction in state authorities which, if true, would have enabled the federal court to act on the application immediately. *E. g., Ex parte Fonda,* 117 U. S. 516; *Cook* v. *Hart,* 146 U. S. 183; *New York* v. *Eno,* 155 U. S. 89. As stated in *Cook* v. *Hart,* 146 U. S., at 195, "The party charged *waives no defect of jurisdiction* by submitting to a trial of his case upon the merits . . . . Should . . . [his] rights be denied, his remedy in the Federal court will remain unimpaired." (Emphasis added.) The question whether the Constitution deprived the State of *jurisdiction,* in other words, would remain open under traditional doctrine, on collateral as well as direct attack.

There can be no doubt of the limited scope of habeas corpus during this formative period, and of the consistent efforts to confine the writ to questions of jurisdiction. But the cardinal point for present purposes is that in no case was it held, or even suggested, that habeas corpus would be available to consider any claims by a prisoner held pursuant to a state court judgment whose validity rested on an adequate *nonfederal* ground. Indeed, so long as the writ was confined to claims by state prisoners that the State was constitutionally precluded from exercising its jurisdiction in the particular case, it is difficult to conceive of a decision to detain in such cases resting on an adequate state ground. Even when the concept of jurisdiction was expanded, as in *Ex parte Siebold,* 100

U. S. 371, and other decisions, the matters open on habeas were still limited to those which were believed to have deprived the sentencing court of all competence to act, and which therefore could always be raised on collateral attack. It is for this reason that the *Royall* line of "exhaustion" cases, relied on so heavily by the Court, has no real bearing on the problem before us. For those cases dealt only with the *discretion* of the court to take action which, if the allegations of lack of state jurisdiction were upheld, it would have had *power* to take either before or after state consideration. The issue here, on the other hand, is one of *power*, and wholly different considerations are involved.

In those few instances during this early period when the Court discussed questions it did not regard as jurisdictional, it occasionally went so far as to suggest that a constitutional claim could not be raised on habeas even if the state decision to detain rested on an *inadequate* state ground—that the only avenue of relief was direct review. Thus in *Andrews* v. *Swartz*, 156 U. S. 272, where the claim made on federal habeas was the systematic exclusion of Negroes from a state jury, the Court held it "a sufficient answer to this contention that the state court had jurisdiction both of the offence charged and of the accused." *Id.*, at 276. It continued:

> "Even if it be assumed that the state court improperly denied to the accused . . . the right to show by proof that persons of his race were arbitrarily excluded . . . it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on *habeas corpus* unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void." *Ibid.*

2. *1915–1953 period.*—The next stage of development may be described as beginning in 1915 with *Frank* v. *Mangum,* 237 U. S. 309, and ending in 1953 with *Brown* v. *Allen,* 344 U. S. 443. In *Frank,* the prisoner had claimed before the state courts that the proceedings in which he had been convicted for murder had been dominated by a mob, and the State Supreme Court, after consideration not only of the record but of extensive affidavits, had concluded that mob domination had not been established.[9] Frank then sought federal habeas, and this Court affirmed the denial of relief. But in doing so the Court recognized that Frank's allegation of mob domination raised a constitutional question which he was entitled to have considered by a competent tribunal uncoerced by popular pressures. Such "corrective process" had been afforded by the State Supreme Court, however, and since Frank had received "notice, and a hearing, or an opportunity to be heard" on his constitutional claims (237 U. S., at 326), his detention was not in violation of federal law and habeas corpus would not lie.

It is clear that a new dimension was added to habeas corpus in this case, for in addition to questions previously thought of as "jurisdictional," the federal courts were now to consider whether the applicant had been given an adequate opportunity to raise his constitutional claims before the state courts. And if no such opportunity had been afforded in the state courts, the federal claim would be heard on its merits. The Court thus rejected the views expressed in *Andrews* v. *Swartz, supra,* p. 455, by holding, in effect, that a constitutional claim could be heard on habeas if the State's refusal to give it proper consideration rested on an *inadequate* state ground. But habeas would not lie to reconsider constitutional questions that had been fairly determined. And *a fortiori*

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[9] *Frank* v. *State,* 141 Ga. 243, 280–281, 80 S. E. 1016, 1032–1033.

it would not lie to consider a question when the state court's refusal to do so rested on an adequate and independent state ground.

In this connection, it is important to note the section of the opinion relating to Frank's separate constitutional claim that his involuntary absence from the courtroom at the time the verdict was rendered invalidated the conviction. Frank had failed to raise this point in his motion for a new trial; the state court held that it had been "waived"; and this Court decided that the state rule barring assertion of the point after failure to raise it in a motion for new trial was reasonable and did not violate due process.[10] Clearly, the significance of the Court's ruling was that as to *this* constitutional claim, whatever its merits if the point had been properly preserved, there was an adequate nonfederal ground for the detention.

In no case prior to *Brown* v. *Allen,* I submit, was there any substantial modification of the concepts articulated in the *Frank* decision. In *Moore* v. *Dempsey,* 261 U. S. 86, this Court did require a hearing on federal habeas of a claim similar to that in *Frank,* of mob domination of the trial, even though the state appellate court had purported to pass on the claim, but only by refusing to "assume that the trial was an empty ceremony." [11] The decision of this Court is sufficiently ambiguous that it seems to have meant all things to all men.[12] But I suggest that the decision cannot be taken to have overruled *Frank;* it did not purport to do so, and indeed it was joined by two Justices who had joined in the *Frank* opinion. Rather, what the Court appears to have held was that the state

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[10] See 237 U. S., at 343. The dissenting opinion, 237 U. S., at 345, 346, did not take issue with this holding, but rather focused on the allegations of mob domination.

[11] *Hicks* v. *State,* 143 Ark. 158, 162, 220 S. W. 308, 310.

[12] Compare Hart, *supra,* note 1, at 105; Reitz, *supra,* note 1, at 1328–1329; Bator, *supra,* note 1, at 488–491.

appellate court's perfunctory treatment of the question of mob domination, amounting to nothing more than reliance on the presumptive validity of the trial, was not in fact acceptable corrective process and federal habeas would therefore lie to consider the merits of the claim. Until today, the Court has consistently so interpreted the opinion, as in *Ex parte Hawk*, 321 U. S. 114, 118, where *Moore* was cited as an example of a case in which "the remedy afforded by state law proves in practice unavailable or seriously inadequate." See also *Jennings* v. *Illinois*, 342 U. S. 104, 111.

Certainly, there is no basis in the *Moore* opinion, whatever it may fairly be taken to mean, for concluding that the Court required consideration on federal habeas of a question which the state court had had an *adequate state ground* for refusing to consider. The claim of mob domination *was* considered, although apparently inadequately, by the state court, and it was only on this premise that the claim was required to be heard on habeas.

Subsequent decisions involving state prisoners continued to indicate that the controlling question on federal habeas—apart from matters going to lack of state jurisdiction in light of federal law—was whether or not the State had afforded adequate opportunity to raise the federal claim. If not, the federal claim could be considered on its merits. See, *e. g.*, *Mooney* v. *Holohan*, 294 U. S. 103; *White* v. *Ragen*, 324 U. S. 760; *Woods* v. *Nierstheimer*, 328 U. S. 211; cf. *Jennings* v. *Illinois*, 342 U. S. 104.[13]

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[13] It has been suggested that language in such cases as *White* v. *Ragen*, 324 U. S. 760, 765, and *House* v. *Mayo*, 324 U. S. 42, 48, supports the result reached today by indicating that federal habeas will lie when an adequate state ground bars direct review by this Court. See Brennan, *supra*, note 1, at 431–432, n. 51; Reitz, *supra*, note 1, at 1359–1360. But these cases do not stand for this proposition. In each of them the state court appeared to have denied that

A development paralleling that in *Frank* v. *Mangum* took place during this period with regard to federal prisoners. The writ remained unavailable to consider questions that were or could have been raised in the original proceedings, or on direct appeal, see *Sunal* v. *Large*, 332 U. S. 174, but it was employed to permit consideration of constitutional questions that could not otherwise have been adequately presented to the courts. *E. g., Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101. This limited scope of habeas corpus, and its statutory substitute 28 U. S. C. § 2255, in relation to federal prisoners may have survived *Brown* v. *Allen* and may still survive today. See, *e. g., Franano* v. *United States*, 303 F. 2d 470, cert. denied, 371 U. S. 865. Compare *Jordan* v. *United States*, 352 U. S. 904.

To recapitulate, then, prior to *Brown* v. *Allen*, habeas corpus would not lie for a prisoner who was in custody pursuant to a state judgment of conviction by a court of

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the particular post-conviction remedy sought was available to redress a claim of federal right that could not have been adequately asserted in the original trial. In each of them, it remained possible that other state remedies might be open, in which event it seemed clear that the particular denial of relief rested on an adequate state ground. But if it was subsequently determined—either by further attempts to obtain state relief or by proof in a Federal District Court—that no state remedies of any kind were ever available in the state courts, then federal habeas would lie. For, "it is not simply a question of state procedure," and there is no truly adequate state ground, "when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." *Young* v. *Ragen*, 337 U. S. 235, 238; cf. *Ward* v. *Love County*, 253 U. S. 17; *General Oil Co.* v. *Crain*, 209 U. S. 211. In other words, the proposition that cases such as *White* v. *Ragen* do stand for is that this Court will, as a matter of sound judicial administration, accept what *appears on its face* to be an adequate state ground because the Federal District Court remains open for more intensive consideration of the petitioner's claim of inadequacy. Cf. 28 U. S. C. § 2241 (b).

competent jurisdiction if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts. Clearly, under this approach, a detention was not in violation of federal law if the validity of the state conviction on which that detention was based rested on an adequate nonfederal ground.

3. *Post-1953, Brown* v. *Allen, period.*—In 1953, this Court rendered its landmark decisions in *Brown* v. *Allen*, 344 U. S. 443, and *Daniels* v. *Allen*, reported therewith, 344 U. S., at 482–487.[14] Both cases involved applications for federal habeas corpus by prisoners who were awaiting execution pursuant to state convictions. In both cases, the constitutional contentions made were that the trial court had erred in ruling confessions admissible and in overruling motions to quash the indictment on the basis of alleged discrimination in the selection of jurors.

In *Brown*, these contentions had been presented to the highest court of the State, on direct appeal from the conviction, and had been rejected by that court on the merits, *State* v. *Brown*, 233 N. C. 202, 63 S. E. 2d 99, after which this Court had denied certiorari, 341 U. S. 943. At this point, the Court held, Brown was entitled to full reconsideration of these constitutional claims, with a hearing if appropriate, in an application to a Federal District Court for habeas corpus.

It is manifest that this decision substantially expanded the scope of inquiry on an application for federal habeas corpus.[15] *Frank* v. *Mangum* and *Moore* v. *Dempsey* had denied that the federal courts in habeas corpus sat to

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[14] A third case, *Speller* v. *Allen*, was also reported at the same time but was not significantly different, for present purposes, from *Brown* v. *Allen*.

[15] *Brown* v. *Mississippi*, 297 U. S. 278, cited by the Court, *ante*, p. 414, arose on direct review of a state conviction, and did not suggest that a claim of a coerced confession, once determined by the state courts, could be redetermined on federal habeas.

determine whether errors of law, even constitutional law, had been made in the original trial and appellate proceedings. Under the decision in *Brown*, if a petitioner could show that the validity of a state decision to detain rested on a determination of a constitutional claim, and if he alleged that determination to be erroneous, the federal court had the right and the duty to satisfy itself of the correctness of the state decision.

But what if the validity of the state decision to detain rested not on the determination of a federal claim but rather on an adequate nonfederal ground which would have barred direct review by this Court? That was the question in *Daniels*. The attorney for the petitioners in that case had failed to mail the appeal papers on the last day for filing, and although he delivered them by hand the next day, the State Supreme Court refused to entertain the appeal, ruling that it had not been filed on time. This ruling, this Court held, barred federal habeas corpus consideration of the claims that the state appellate court had refused to consider. Language in Mr. Justice Reed's opinion for the Court appeared to support the result alternatively in terms of waiver,[16] failure to exhaust state remedies,[17] and the existence of an adequate state ground.[18] But while the explanation may have been ambiguous, the result was clear: habeas corpus would not lie

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[16] See 344 U. S., at 486. See also Mr. Justice Frankfurter's separate opinion, 344 U. S., at 488, 503.

[17] "A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ." 344 U. S., at 487.

[18] "[W]here the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed." 344 U. S., at 458.

for a prisoner who was detained pursuant to a state judgment which, in the view of the majority in *Daniels*, rested on a reasonable application of the State's own procedural requirements. Moreover, the issue was plainly viewed as one of *authority*, not of discretion. 344 U. S., at 485.

I do not pause to reconsider here the question whether the state ground in *Daniels* was an adequate one; persuasive arguments can be made that it was not. The important point for present purposes is that the approach in *Daniels* was wholly consistent with established principles in the field of habeas corpus jurisdiction. The problem, however, had been brought into sharper focus by the result in *Brown*. Once it is made clear that the questions open on federal habeas extend to such matters as the admissibility of confessions, or of other evidence, the possibility that inquiry may be precluded by the existence of a state ground adequate to support the judgment is substantially increased.

Issues similar to those in *Daniels* next came before the Court in *Irvin* v. *Dowd*, 359 U. S. 394. In that case, the state court's decision affirming Irvin's conviction for murder was ambiguous and it could have been interpreted to rest on a state ground even though Irvin's federal constitutional claims were considered. *Irvin* v. *State*, 236 Ind. 384, 139 N. E. 2d 898; see also the dissenting opinion of this writer in *Irvin* v. *Dowd*, *supra*, 412. This Court, in reversing a dismissal of an application for federal habeas corpus, concluded that the state court decision had rested on determination of Irvin's federal claims, and held that those claims could therefore be considered on federal habeas. The majority appeared to approach the problem as one of exhaustion,[19] but the basic determination was

[19] Analysis of the problem in terms of exhaustion of remedies no longer available has been severely criticized. Hart, *supra*, note 1, at 112–114. This "exhaustion" approach is today quite properly interred. *Ante*, pp. 434–435.

that the state court judgment, pursuant to which Irvin was detained, did not rest on an application of the State's procedural rules.

This brings us to the present case. There can, I think, be no doubt that today's holding—that federal habeas will lie despite the existence of an adequate and independent nonfederal ground for the judgment pursuant to which the applicant is detained—is wholly unprecedented. Indeed, it constitutes a direct rejection of authority that is squarely to the contrary. That the result now reached is a novel one does not, of course, mean that it is necessarily incorrect or unwise. But a decision which finds virtually no support in more than a century of this Court's experience should certainly be subject to the most careful scrutiny.

## II.

### CONSTITUTIONAL BARRIER.

The true significance of today's decision can perhaps best be laid bare in terms of a hypothetical case presenting questions of the powers of this Court on direct review, and of a Federal District Court on habeas corpus.

1. *On direct review.*—Assume that a man is indicted, and held for trial in a state court, by a grand jury from which members of his race have been systematically excluded. Assume further that the State requires any objection to the composition of the grand jury to be raised prior to the verdict, that no such objection is made, and that the defendant seeks to raise the point for the first time on appeal from his conviction. If the state appellate court refuses to consider the claim because it was raised too late, and if certiorari is sought and granted, the initial question before this Court will be whether there was an adequate state ground for the judgment below. If the petitioner was represented by counsel not shown to be incompetent, and if the necessary information to make

the objection is not shown to have been unavailable at the time of trial, it is certain that the judgment of conviction will stand, despite the fact the indictment was obtained in violation of the petitioner's constitutional rights.[20]

What is the reason for the rule that an adequate and independent state ground of decision bars Supreme Court review of that decision—a rule which, of course, is as applicable to procedural as to substantive grounds? In *Murdock* v. *Memphis*, 20 Wall. 590, 632–636, it was concluded that under the governing statute (i) the Court did not have jurisdiction, on review of a state decision, to examine and decide "questions not of a Federal character," *id.*, at 633, and (ii) an erroneous decision of a federal question by a state court could not warrant reversal if there were:

> "any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question." *Id.*, at 636.

But as the Court in *Murdock* so strongly implied, and as emphasized in subsequent decisions, the adequate state ground rule has roots far deeper than the statutes governing our jurisdiction, and rests on fundamentals that touch this Court's habeas corpus jurisdiction equally with its direct reviewing power. An examination of the alternatives that might conceivably be followed will, I submit, confirm that the rule is one of constitutional dimensions going to the heart of the division of judicial powers in a federal system.

One alternative to the present rule would be for the Court to review and decide any federal questions in the

[20] See *Michel* v. *Louisiana*, 350 U. S. 91.

case, even if the determination of nonfederal questions were adequate to sustain the judgment below, and then to send the case back to the state court for further consideration. But it needs no extended analysis to demonstrate that such action would exceed this Court's powers under Article III. As stated in *Herb* v. *Pitcairn*, 324 U. S. 117, 126:

> "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Another alternative, which would avoid the problem of advisory opinions, would be to take the entire case and to review on the merits the state court's decision of *every* question in it. For example, in our hypothetical case the Court might consider on its merits the question whether the state court correctly ruled that under state law objections to the composition of the grand jury must be made prior to the verdict.

To a limited extent, of course, this procedural ruling of the state court raises federal as well as state questions. It is clear that a State may not preclude Supreme Court review of federal claims by discriminating against or evading the assertion of a federal right, and indeed that state procedural grounds for refusal to consider a federal claim must rest on a "fair or substantial basis." [21] Occasionally this means that a state procedural rule which may properly preclude the raising of state claims in a state court

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[21] *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282. See, *e. g.*, *Rogers* v. *Alabama*, 192 U. S. 226; *NAACP* v. *Alabama*, 357 U. S. 449. See also Hart and Wechsler, The Federal Courts and the Federal System, 501.

cannot thwart review of federal claims in this Court.[22] These principles are inherent in the concept that a state ground, to be of sufficient breadth to support the judgment, must be *both* "adequate" and "independent."

But determination of the adequacy and independence of the state ground, I submit, marks the constitutional limit of our power in this sphere. The reason why this is so was perhaps most articulately expressed in a different but closely related context by Mr. Justice Field in his opinion in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 401. He stated, in a passage quoted with approval by the Court in the historic decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79:

> "[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

For this Court to go beyond the adequacy of the state ground and to review and determine the correctness of that ground on its merits would, in our hypothetical case, be to assume full control over a State's procedures for the administration of its own criminal justice. This is and must be beyond our power if the federal system is to exist in substance as well as form. The right of the State to

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[22] See *Davis* v. *Wechsler*, 263 U. S. 22; *New York Central R. Co.* v. *New York & Pa. Co.*, 271 U. S. 124; *NAACP* v. *Alabama*, *supra*. See also the discussion in the dissenting opinion in *Williams* v. *Georgia*, 349 U. S. 375, 393, 399.

regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing "substantive" laws governing other aspects of the conduct of those within its borders.

There is still a third possible course this Court might follow if it were to reject the adequate state ground rule. The Act of 1867, which in § 1 extended the habeas corpus jurisdiction to state prisoners detained in violation of federal law, in § 2 gave the Supreme Court the authority, in cases coming from the state courts, to order execution directly without remanding the case. 14 Stat. 385, 386–387. That authority, which has been exercised at least once,[23] remained unimpaired through the modifications of appellate and certiorari jurisdiction,[24] and exists today.[25] Acting pursuant to that authority in our hypothetical case, this Court might grant certiorari, "ignore" the state ground of decision, decide the federal question and, in-

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[23] In *Tyler* v. *Magwire*, 17 Wall. 253, 293, the Court issued a writ of possession and ordered its marshal to execute it against the state defendant in possession.

[24] The successive statutes are collected and set out in full in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland ed. 1951), Appendix A.

[25] 28 U. S. C. § 2106 authorizes the Court to vacate, as well as reverse, affirm or modify, any judgment lawfully brought before it for review. 28 U. S. C. § 1651 (a) provides that the Court "may issue all writs necessary or appropriate" in aid of its jurisdiction. See also 28 U. S. C. § 2241 (a), giving this Court specific authority to issue writs of habeas corpus. Such writs are to be executed, under 28 U. S. C. § 672, by the marshal of this Court, who is authorized by 28 U. S. C. § 549, when acting within a State, to "exercise the same powers which a sheriff of such state may exercise in executing the laws thereof." The power to enter judgment and, when necessary, to enforce it by appropriate process, has been said to be inherent in the Court's appellate jurisdiction. *Stanley* v. *Schwalby*, 162 U. S. 255, 279–282. See also Hart and Wechsler, *supra*, note 21, at 420–421.

stead of merely remanding the case, issue a writ requiring the petitioner's release from custody. By this simple device, the Court, it might be argued, would avoid problems of advisory opinions while at the same time refraining from consideration of questions of state law.

But apart from the unseemliness of such a disposition, it is apparent that what the Court would actually be doing would be to decide the state law question *sub silentio* and to reverse the state court judgment on that question. For if the petitioner is detained pursuant to the judgment, and his detention is to be terminated, that must mean that the state ground is not adequate to support the only purpose for which the judgment was rendered. The judgment, in other words, becomes a nullity.

Moreover, the future effect of such a disposition is precisely the same as a reversal on the merits of the question of state law. If noncompliance with a state rule requiring a particular constitutional claim to be raised before verdict does not preclude consideration of the claim by this Court, then the rule is invalid in every significant sense, since no judgment based on its application can ever be effective.

In short, the constitutional infirmities of such a disposition by this Court are the same as those inherent in review of the state question on its merits. The vice, however, is greater because the Court would, in actuality, be invalidating a state rule without even purporting to consider it.

2. *On habeas corpus.*—The adequate state ground doctrine thus finds its source in basic constitutional principles, and the question before us is whether this is as true in a collateral attack in habeas corpus as on direct review. Assume, then, that after dismissal of the writ of certiorari in our hypothetical case, the prisoner seeks habeas corpus in a Federal District Court, again complaining of the composition of the grand jury that indicted him. Is that

federal court constitutionally more free than the Supreme Court on direct review to "ignore" the adequate state ground, proceed to the federal question, and order the prisoner's release?

The answer must be that it is not. Of course, as the majority states, a judgment is not a "jurisdictional prerequisite" to a habeas corpus application, *ante,* p. 430, but that is wholly irrelevant. The point is that if the applicant is detained *pursuant* to a judgment, termination of the detention necessarily nullifies the judgment. The fact that a District Court on habeas has fewer choices than the Supreme Court, since it can *only* act on the body of the prisoner, does not alter the significance of the exercise of its power. In habeas as on direct review, ordering the prisoner's release invalidates the judgment of conviction and renders ineffective the state rule relied upon to sustain that judgment. Try as the majority does to turn habeas corpus into a roving commission of inquiry into every possible invasion of the applicant's civil rights that may ever have occurred, it cannot divorce the writ from a judgment of conviction if that judgment is the basis of the detention.

Thus in the present case if this Court had granted certiorari to review the State's denial of *coram nobis,* had considered the coerced confession claim, and had ordered Noia's release, the necessary effects of that disposition would have been (1) to set aside the conviction and (2) to invalidate application of the New York rule requiring the claim to be raised on direct appeal in order to be preserved. It is, I think, beyond dispute that the Court does exactly the same thing by affirming the decision below in this case. In doing so, the Court exceeds its constitutional power if in fact the state ground relied upon to sustain the judgment of conviction is an adequate one. See pp. 472–476, *infra.* The effect of the approach adopted by the Court is, indeed, to do away with the adequate

state ground rule entirely in every state case, involving a federal question, in which detention follows from a judgment.

The majority seems to recognize at least some of the consequences of its decision when it attempts to fill the void created by abolition of the adequate state ground rule in state criminal cases. But the substitute it has fashioned—that of "conscious waiver" or "deliberate bypassing" of state procedures—is, as I shall next try to show, wholly unsatisfactory.

## III.

### ATTEMPTED PALLIATIVES.

Apparently on the basis of a doctrine analogous to that of "unclean hands," the Court states that a federal judge, in his discretion, may deny relief on habeas corpus to one who has understandingly and knowingly refused to avail himself of state procedures. But such a test, if it is meant to constitute a limitation on interference with state administration of criminal justice, falls far short of the mark. In fact, as explained and applied in this case, it amounts to no limitation at all.

*First,* the Court explains that the test is one calling for the exercise of the district judge's *discretion,* that the judge may, in other words, grant relief even when a conscious waiver has been shown. Thus the Court does not merely tell the States that, if they wish to detain those whom they convict, they must revamp their entire systems of criminal procedures so that no forfeiture may be imposed in the absence of deliberate choice; the States are also warned that even a deliberate, explicit, intelligent choice not to assert a constitutional right may not preclude its assertion on federal habeas.

*Second,* the Court states (as it must if it is to adhere to its definition) that "[a] choice made by counsel not par-

ticipated in by the petitioner does not automatically bar relief." *Ante,* p. 439. It is true that there are cases in which the adequacy of the state ground necessarily turns on the question whether the defendant himself expressly and intelligently waived a constitutional right. Foremost among these are the cases involving right to counsel, for the Court has made it clear that this right cannot be foregone without deliberate choice by the defendant. See *Johnson* v. *Zerbst,* 304 U. S. 458; *Carnley* v. *Cochran,* 369 U. S. 506. But to carry this principle over in full force to cases in which a defendant is represented by counsel not shown to be incompetent is to undermine the entire representational system. We have manifested an ever-increasing awareness of the fundamental importance of representation by counsel, see *Gideon* v. *Wainwright, ante,* p. 335, and yet today the Court suggests that the State may no more have a rule of forfeiture for one who is competently represented than for one who is not. The effect on state procedural rules may be disastrous.

*Third,* when it comes to apply the "waiver" test in this case, the Court then in effect reads its own creation out of existence. Recognizing that Noia himself decided not to appeal, and that he apparently made this choice after consultation with counsel, the Court states that his decision was nevertheless not a "waiver." Since a new trial might have resulted in a death sentence, Noia was, in the majority's view, confronted with a "grisly choice," and he quite properly declined to play "Russian roulette" by appealing his conviction. *Ante,* pp. 439–440.

Does the Court mean by these colorful phrases that it would be unconstitutional for the State to impose a heavier sentence in a second trial for the same offense? Apparently not, since the majority assures us that there may be some cases in which a risk of a heavier sentence must be run. What distinguishes this case, we are told, is that the risk of the death sentence on a new trial was

substantial in view of the trial judge's statement that Noia's past record and his involvement in the crime almost led the judge to disregard the jury's recommendation against a death sentence.

What the Court seems to be saying in this exercise in fine distinctions is that no waiver of a right can be effective if some adverse consequence might reasonably be expected to follow from exercise of that right. Under this approach, of course, there could never be a binding waiver, since only an incompetent would give up a right without any good reason, and an incompetent cannot make an intelligent waiver. The Court wholly ignores the question whether the choice made by the defendant is one that the State could constitutionally require.

Looked at from any angle, the concept of waiver which the Court has created must be found wanting. Of gravest importance, it carries this Court into a sphere in which it has no proper place in the context of the federal system. The true limitations on our constitutional power are those inherent in the rule requiring that a judgment resting on an adequate state ground must be respected.

## IV.

### ADEQUACY OF THE STATE GROUND HERE INVOLVED.

It is the adequacy, or fairness, of the state ground that should be the controlling question in this case.[26] This controlling question the Court does not discuss.

New York asserts that a claim of the kind involved here must be raised on timely appeal if it is to be pre-

[26] In view of the concession by the State, I assume in this discussion that Noia's confession was coerced. A confession, of course, may be coerced and yet still be a wholly reliable admission of guilt. See *Rogers* v. *Richmond,* 365 U. S. 534. Whether or not Noia was guilty of the crime of felony murder, and whether the evidence of his guilt was accurate and substantial, are matters irrelevant to the question of coercion and also irrelevant here.

served, and contends that in permitting an appeal it has provided a reasonable opportunity for the claim to be made. The collateral post-conviction writ of *coram nobis,* the State has said, remains a remedy only for the calling up of facts unknown at the time of the judgment. See *People* v. *Noia,* decided *sub nom. People* v. *Caminito,* 3 N. Y. 2d 596, 601, 148 N. E. 2d 139, 143. In other words, the State claims that it may constitutionally detain a man pursuant to a judgment of conviction, regardless of any error that may have led to that conviction, if the relevant facts were reasonably available and an appeal was not taken.

Under the circumstances here—particularly the fact that Noia was represented by counsel whose competence is not challenged—is this a reasonable ground for barring collateral assertion of the federal claim? Certainly the State has a vital interest in requiring that appeals be taken on the basis of facts known at the time, since the first assertion of a claim many years later might otherwise require release long after it was feasible to hold a new trial. And although in *Daniels* v. *Allen* it might have been argued that the State's refusal to entertain an appeal actually received on time amounted to an evasion of the federal claim, no such argument can be made here, since no appeal was *ever* sought.

Moreover, we should be slow to reject—as an invalid barrier to the raising of a federal right—a state determination that one forum rather than another must be resorted to for the assertion of that right. A far more rigid restriction of federal forums was upheld in *Yakus* v. *United States,* 321 U. S. 414. In that case, the Court sustained a federal statute permitting an attack on the validity of an administrative price regulation to be made only on timely review of the administrative order, and precluding the defense of invalidity in a later criminal prosecution

for violation of the regulation. What the Court there said bears repetition here:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." 321 U. S., at 444.

But is there some special circumstance here that operates to invalidate the nonfederal ground? Certainly it cannot be that the claim of a coerced confession is of such a nature that a State is constitutionally compelled to permit its assertion at any time even if it could have been, but was not, raised on appeal. Many federal decisions have held that a federal prisoner held pursuant to a federal conviction may not assert such a claim in collateral proceedings when it was not, but could have been, asserted on appeal. *E. g., Davis* v. *United States,* 214 F. 2d 594, cert. denied, 353 U. S. 960; *Smith* v. *United States,* 88 U. S. App. D. C. 80, 187 F. 2d 192, cert. denied, 341 U. S. 927; see *Hodges* v. *United States,* 108 U. S. App. D. C. 375, 282 F. 2d 858, cert. dismissed, 368 U. S. 139.

Is it then a basis for invalidating the nonfederal ground that Noia's two codefendants are today free from custody on facts which Noia says are identical to those in his case? Does the nonfederal ground fall when the federal claim appears to have obvious merit? There may be some question whether the facts in Noia's case and those in Bonino's and Caminito's are identical,[27] but assuming that they are, I think it evident that the nonfederal ground must still stand.

Again, there is highly relevant precedent dealing with federal prisoners. In *Sunal* v. *Large,* 332 U. S. 174, Sunal

[27] See *People* v. *Noia,* 4 App. Div. 2d 698, 163 N. Y. S. 2d 796.

and Kulick had been prosecuted for violation of the Selective Service Act, and both had sought to raise a defense the court had refused to consider. Both were convicted and sentenced to imprisonment but took no appeal, quite evidently because such an appeal would have been to no avail under the existing state of the law. Subsequently, in another case, this Court held on comparable facts that the defense in question must be permitted. *Estep* v. *United States,* 327 U. S. 114. Sunal and Kulick then sought relief on habeas corpus, and this relief was denied. The opinion of the Court observed that there had been no barrier to the perfection of appeals by these prisoners and no facts which were not then known. That an appeal may have appeared futile at the time (indeed, far more futile than was the case here) was held not a sufficient basis for collateral relief. The present case, I submit, would be less troublesome than *Sunal* even had it involved a federal prisoner.

Surely, the state ground is not rendered inadequate because on a new trial for the same offense, Noia might have received the death sentence. The State is well within constitutional limits in permitting such a sentence to be imposed. Of particular relevance here is the decision in *Larson* v. *United States,* 275 F. 2d 673. Two criminal defendants had been tried and sentenced to imprisonment by a federal court. One defendant, Juelich, had moved for a continuance or a change of venue, on the ground of community prejudice, and his motion had been denied. Both defendants were convicted; Juelich appealed from his conviction; and the Court of Appeals reversed, *Juelich* v. *United States,* 214 F. 2d 950, holding that the constitutional requirement of a fair trial had been violated by the refusal to grant a change of venue or a continuance. Larson, the other defendant, had chosen not to appeal, apparently because he feared that the death sentence

might be imposed in a new trial, but after his codefendant's success, he sought collateral relief under § 2255. That relief was denied by the District Court, and the Court of Appeals affirmed, stating:

> "We do not say . . . that in every instance, before resort can be had to Section 2255 there must be an appeal. We say only that, in the circumstances of this case, Larson, taking a calculated risk, made a free choice not to jeopardize his life, and he is bound by that decision. . . . Whatever errors there were in his trial were known to Larson and to his counsel—for the same errors formed the basis for Juelich's appeal. Manifest justice to an accused person requires only that he have an opportunity to correct errors that may have led to an unfair trial. The orderly administration of justice requires that even a criminal case some day come to an end." 275 F. 2d, at 679–680.

This Court denied certiorari. 363 U. S. 849.

Decisions such as *Sunal* and *Larson* are reasoned expressions by the federal judiciary of its views on the fair and proper administration of federal criminal justice. We cannot turn around and tell the State of New York that it is constitutionally prohibited from being governed by the same considerations.

I recognize that Noia's predicament may well be thought one that strongly calls for correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts.[28] Since Noia is detained pursuant to a state judgment whose validity rests on an adequate and independent state ground, the judgment below should be reversed.

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[28] At the oral argument the State District Attorney advised us that his office would support an application for clemency once the case had been disposed of in this Court.

## LANE, WARDEN, *v.* BROWN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 283. Argued January 16–17, 1963.—Decided March 18, 1963.

In an Indiana State Court, respondent was convicted of murder and sentenced to death. After an unsuccessful appeal, he filed in the Trial Court a petition for writ of error *coram nobis*. After a hearing, at which respondent was represented by the Public Defender, that Court denied relief. Respondent requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court; but the Public Defender refused, because he believed that an appeal would be unsuccessful. Respondent next applied to the Trial Court for a transcript of the *coram nobis* hearing and the appointment of counsel to perfect an appeal, but this was denied. The Supreme Court of Indiana refused to order the Trial Court to grant petitioner's request for a transcript and appointment of counsel, on the ground that, under Indiana law, an appeal from denial of a writ of error *coram nobis* can be perfected only by filing in the State Supreme Court a transcript of the hearing and such transcript can be obtained for an indigent only by the Public Defender. Respondent applied to a Federal District Court for a writ of habeas corpus. *Held:* Indiana has deprived respondent of a right secured by the Fourteenth Amendment by refusing him appellate review of the denial of writ of error *coram nobis* solely because of his poverty. Pp. 477–485.

302 F. 2d 537, judgment vacated and cause remanded.

*William D. Ruckelshaus,* Assistant Attorney General of Indiana, by special leave of the Court, *pro hac vice,* argued the cause for petitioner. With him on the brief was *Edwin K. Steers,* Attorney General.

*Nathan Levy* argued the cause for respondent. With him on the brief was *Joseph T. Helling.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, George Robert Brown, is in an Indiana prison under sentence of death. He is an indigent.

In a federal habeas corpus proceeding the District Court held that Indiana has deprived Brown of a right secured by the Fourteenth Amendment by refusing him appellate review of the denial of a writ of error *coram nobis* solely because of his poverty. 196 F. Supp. 484. The Court of Appeals affirmed. 302 F. 2d 537. We agree that the Indiana procedure at issue in this case falls short of the requirements of the Fourteenth Amendment of the United States Constitution.

In the administration of its criminal law, Indiana seems to have long pursued a conspicuously enlightened policy in the quest for equal justice to the destitute, and it is not without irony that the constitutional problem in this case stems from legislation evidently enacted to enlarge that State's existing system of aid to the indigent. For more than a hundred years the Indiana Constitution has guaranteed the assistance of counsel to every defendant in a criminal trial.[1] This right has been extended to include the right of an indigent to consult with a lawyer prior to arraignment,[2] as well as the right to be represented by counsel on appeal from a criminal conviction.[3] It has also been established for more than a century in Indiana that a poor person appealing a criminal conviction may secure a transcript of the trial record without

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[1] Ind. Const., Art. 1, § 13 (1851). In 1854 the Supreme Court of Indiana said: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial." *Webb* v. *Baird*, 6 Ind. 13, 18. (Quoted in the dissenting opinion in *Betts* v. *Brady*, 316 U. S. 455, at 476–477.)

[2] *Batchelor* v. *State*, 189 Ind. 69, 125 N. E. 773 (1920).

[3] *State* v. *Hilgemann*, 218 Ind. 572, 34 N. E. 2d 129 (1941); *State ex rel. Grecco* v. *Allen Circuit Court*, 238 Ind. 571, 575, 153 N. E. 2d 914, 916 (1958). But see *State ex rel. Macon* v. *Orange Circuit Court*, 243 Ind. 429, 185 N. E. 2d 619.

cost.[4] In 1945 the Indiana Legislature enacted the so-called Public Defender Act, a law to deal with the problem of providing legal assistance to indigent prisoners in postconviction proceedings. It is the operation of the provisions of this law, as interpreted by the Supreme Court of Indiana, which we find constitutionally deficient in the present case.

The 1945 legislation created the office of Public Defender, to be appointed by the State Supreme Court,[5] and, as later amended, authorized him to employ "such deputies, stenographers or other clerical help as may be required to discharge his duties . . . ."[6] The provisions of the law which are at the root of the problem in the case before us are those which define the Public Defend-

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[4] *Falkenburgh* v. *Jones*, 5 Ind. 296 (1854); *State ex rel. Morris* v. *Wallace*, 41 Ind. 445 (1872). Since 1893, the right to a transcript has been conferred by statute. Burns Ind. Ann. Stat., 1946, § 4–3511.

[5] "There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the state of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana, and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment." Indiana Acts 1945, c. 38, § 1, Burns Ind. Ann. Stat., 1956, § 13–1401.

[6] "The public defender shall be paid an annual salary to be fixed by the supreme court of this state. He may, with the consent of said court, appoint or employ such deputies, stenographers or other clerical help as may be required to discharge his duties at compensation to be fixed by the court. He shall be provided with an office at a place to be located and designated by the Supreme Court, and he shall be paid his actual necessary and reasonable traveling expenses, including cost of food and lodging when away from the municipality in which his office is located on business of the office of the public defender, and he shall be provided with office furniture, fixtures and equipment, books, stationery, printing services, postage and supplies." Indiana Acts 1945, c. 38, § 4, as amended, Burns Ind. Ann. Stat., 1956, § 13–1404.

er's basic duties and which authorize him to order hearing transcripts, or their equivalent, at public expense:

> "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired." [7]
>
> "The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed." [8]

The rules of the Indiana Supreme Court expressly permit an appeal from the denial of a writ of error *coram nobis,* but also require that a transcript be filed in order to confer jurisdiction upon the court to hear such an appeal.[9] The Indiana court has held that under the

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[7] Indiana Acts 1945, c. 38, § 2, Burns Ind. Ann. Stat., 1956, § 13–1402.

[8] Indiana Acts 1945, c. 38, § 5, Burns Ind. Ann. Stat., 1956, § 13–1405.

[9] "Rule 2–40 of this court, 1958 Edition, provides, in relevant part:

" 'An appeal may be taken to the Supreme Court from a judgment granting or denying a petition for a writ of error coram nobis. The sufficiency of the pleadings and of the evidence to entitle the petitioner to a vacation of the judgment will be considered upon an assignment of error that the finding is contrary to law. The transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the clerk of the Supreme Court within ninety (90) days after the date of the decision. The provisions of the rules of this court applicable to appeals

above-quoted provisions of the Public Defender Act, only the Public Defender can procure a transcript of a *coram nobis* hearing for an indigent; an indigent cannot procure a transcript for himself and appeal *pro se,* nor can he secure the appointment of another lawyer to get the transcript and prosecute the appeal. *State ex rel. Casey* v. *Murray,* 231 Ind. 74, 106 N. E. 2d 911; *Jackson* v. *Reeves,* 238 Ind. 708, 153 N. E. 2d 604; *Willoughby* v. *State,* 242 Ind. 183, 177 N. E. 2d 465. The upshot is that a person with sufficient funds can appeal as of right to the Supreme Court of Indiana from the denial of a writ of error *coram nobis,* but an indigent can, at the will of the Public Defender, be entirely cut off from any appeal at all.

The impact of this system is fully illustrated by the history of the present case. Brown was convicted of murder in an Indiana trial court and sentenced to death. The conviction was affirmed on appeal, 239 Ind. 184, 154 N. E. 2d 720, and this Court denied a petition for a writ of certiorari. 361 U. S. 936. Thereafter, Brown filed in the Federal District Court an application for habeas corpus which was dismissed because of failure to exhaust available state remedies. Brown then filed a petition for a writ of error *coram nobis* in the state trial court. After a hearing at which Brown was represented by the Public Defender, the court denied relief. Brown requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court. This request was refused because of the Public Defender's stated belief that an

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from final judgments shall govern as to the form and time of filing briefs.' " *McCrary* v. *State,* 241 Ind. 518, 533–534, 173 N. E. 2d 300, 307.

"Rule 2–6 of this court, 1958 Edition, provides, in relevant part:

" 'There shall be attached to the front of the transcript, immediately following the index, a specific assignment of the errors relied upon by the appellant in which each specification of error shall be complete and separately numbered.' " 241 Ind., at 533, 173 N. E. 2d, at 307.

appeal would be unsuccessful.[10] Brown next applied to the state trial court for a transcript of the *coram nobis* hearing and the appointment of counsel to perfect an appeal. This application was denied. The Supreme Court of Indiana refused to order the trial court to grant the petitioner's request for a transcript and appointment of counsel, stating:

> "Under the circumstances presented, the public defender was under no duty to request a transcript of the proceedings in error coram nobis and, in the absence of a request from said office, the trial court was under no duty to provide a certified copy of said proceedings at public expense." *Brown* v. *Indiana,* 241 Ind. 298, 302, 171 N. E. 2d 825, 827.

Brown again sought a writ of certiorari in this Court, and his petition was again denied, "without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court . . . ." 366 U. S. 954.

Brown finally instituted in the Federal District Court the habeas corpus proceedings we now review. His petition alleged, in addition to four substantive grounds for relief,[11] "That Relator has been denied equal protection of

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[10] "After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judgment denying your Petition for Writ of Error Coram Nobis."

[11] "(1) Inadequate representation by court-appointed counsel at his trial in Lake County, Indiana Criminal Court.

"(2) Procurement by State authorities of a confession from petitioner through fear produced by threats and prolonged questioning during an illegal detention.

"(3) Admission of confession before proof of the corpus delicti.

"(4) Admission into evidence of exhibits and testimony of petitioner's prior commitment to a mental institution and crimes of rape and attempted rape alleged to have been committed by the petitioner."

the law in that he was effectively denied an appeal from the Order of the Lake County, Indiana Criminal Court, denying his petition for writ of error coram nobis because of his poverty and inability to secure a transcript, which right of appeal is available to all defendants in Indiana who can afford the expense of a transcript." The court, directing its attention only to this last issue, held "that the actions of the State of Indiana have denied petitioner equal protection of the laws," and ordered that Brown "be given a full, appellate review of his Coram Nobis denial" within 90 days or such additional time as the court might thereafter determine. 196 F. Supp., at 488. Upon the failure of Indiana to provide such a review, the District Court ordered Brown's discharge from custody, but granted a stay pending appellate review. The Court of Appeals affirmed the District Court's judgment, directing, however, that Brown continue to be held in custody pending final disposition of the case by this Court. 302 F. 2d, at 540.

Both the District Court and the Court of Appeals were of the opinion that the issue in the present case is controlled by recent decisions of this Court which have held constitutionally invalid procedures of other States found substantially to deny indigent defendants the benefits of an existing system of appellate review. We are in complete agreement.

In *Griffin* v. *Illinois*, 351 U. S. 12, the Court held that a State with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide "means of affording adequate and effective appellate review to indigent defendants." *Id.*, at 20. "Destitute defendants," the Court held, "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.*, at 19. In *Burns* v. *Ohio*, 360 U. S. 252, involving a $20 fee for filing a motion for leave to appeal a felony

conviction to the Supreme Court of Ohio, this Court reaffirmed the *Griffin* doctrine, saying that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. . . . This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*, at 257. In *Smith* v. *Bennett*, 365 U. S. 708, the Court made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings. "Respecting the State's grant of a right to test their detention," the Court said, "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." *Id.*, at 714. In *Eskridge* v. *Washington Prison Board*, 357 U. S. 214, the Court held invalid a provision of Washington's criminal appellate system which conferred upon the trial judge the power to withhold a trial transcript from an indigent upon the finding that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein." *Id.*, at 215. There it was said that "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." *Id.*, at 216.

The present case falls clearly within the area staked out by the Court's decisions in *Griffin*, *Burns*, *Smith*, and *Eskridge*. To be sure, this case does not involve, as did *Griffin*, a direct appeal from a criminal conviction, but *Smith* makes clear that the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt

that the principle applies even though the State has already provided one review on the merits.

In *Eskridge* the Court held constitutionally invalid a provision which permitted a trial judge to prevent an indigent from taking an effective appeal. The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards.[12] We have no doubt that Indiana, with its historic concern for equal justice under law, will find no practical difficulty in correcting the constitutional deficiency which this case exposes.

The judgments of the Court of Appeals and of the District Court are vacated and the case remanded to the latter, so that appropriate orders may be entered ordering Brown's discharge from custody, unless within a reasonable time the State of Indiana provides him an appeal on the merits to the Supreme Court of Indiana from the denial of the writ of error *coram nobis*.

*It is so ordered.*

Separate opinion of MR. JUSTICE HARLAN, in which MR. JUSTICE CLARK concurs.

I think it falls short of the requirements of due process for a State to foreclose an indigent from appealing in a case such as this at the unreviewable discretion of a Public Defender by whom, or by whose office, the indigent has been represented at the trial. It ignores the human equation not to recognize the possibility that a Public

[12] We do not deal here with a preliminary screening procedure applicable alike to all *coram nobis* appeals. Nor need we determine in this case what procedural measures Indiana might constitutionally take to reduce the public expense of indigents' appeals. See *Griffin* v. *Illinois*, 351 U. S., at 20.

Defender so circumstanced may decide not to appeal questions which a lawyer who has had no previous connection with the case might consider worthy of appellate review. (I do not of course remotely intimate that such is the situation here.)

Were it clear that the decision of this Public Defender not to appeal had been subject to judicial review at the instance of the prisoner, I should have voted to sustain this conviction. However, the State Attorney General has candidly informed us that the Indiana law is unclear on this score.

Accordingly, while agreeing with the Court's action in remanding this case, I would instruct the District Court to discharge the prisoner only if the Indiana Supreme Court fails, within a reasonable time, to accord him a review of the Public Defender's decision not to appeal the denial of *coram nobis*.

## DRAPER ET AL. *v.* WASHINGTON ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 201. Argued January 16, 1963.—Decided March 18, 1963.

In a trial in a State Court, in which they were represented by court-appointed counsel, petitioners were convicted of robbery and sentenced to imprisonment. Their motions for a new trial were denied. Being indigents and acting *pro se*, they filed notices of appeal and motions for a free transcript of the record. After a hearing before the trial judge, at which petitioners represented themselves and also had the benefit of court-directed argument by their trial counsel, the trial judge entered findings of fact and conclusions of law respecting each error claimed by petitioners. He then denied their request for a transcript, on the ground that their assignments of error were patently frivolous, their guilt had been established by overwhelming evidence, and the furnishing of a transcript would waste public funds. Solely on the basis of a record of the hearing on this motion, the State Supreme Court sustained the trial judge's ruling on the motion. *Held:* The rules of the State of Washington governing the provision of transcripts to indigent criminal defendants for purposes of appeal were applied in this case so as to deprive petitioners of rights guaranteed to them by the Fourteenth Amendment. Pp. 488–500.

(a) A State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. Pp. 495–496.

(b) In this case, the materials before the State Supreme Court when it reviewed the trial judge's denial of a free transcript did not constitute a record of sufficient completeness for adequate consideration of the errors assigned by petitioners on their appeal. Pp. 496–497.

(c) By allowing the trial judge to prevent petitioners from having stenographic support or its equivalent for presentation of each of their separate contentions to the appellate tribunal, the State denied them rights assured them under the Fourteenth Amendment. Pp. 497–499.

(d) The conclusion of the trial judge that an indigent's appeal is frivolous is an inadequate substitute for the full appellate review available to nonindigents in Washington, when the effect of that finding is to prevent an appellate examination based upon a sufficiently complete record of the trial proceedings themselves. Pp. 499–500.

58 Wash. 2d 830, 365 P. 2d 31, reversed and cause remanded.

*Charles F. Luce,* by appointment of the Court, 371 U. S. 805, argued the cause and filed briefs for petitioners.

*John J. Lally* argued the cause for respondents. With him on the brief was *Joseph J. Rekofke.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Certiorari was granted in this case, 370 U. S. 935, in order that the Court might consider whether the State of Washington's rules governing the provision of transcripts to indigent criminal defendants for purposes of appeal were applied in this case so as to deprive petitioners of rights guaranteed them by the Fourteenth Amendment.

This Court has dealt recently with the constitutional rights of indigents to free transcripts on appeal in *Griffin* v. *Illinois,* 351 U. S. 12, and *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U. S. 214. The principle of *Griffin* is that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," 351 U. S., at 19, a holding restated in *Eskridge* to be "that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials," 357 U. S., at 216. In *Eskridge* the question was the validity of Washington's long-standing procedure whereby an indigent defendant would receive a stenographic transcript at

public expense only if, in the opinion of the trial judge, "justice will thereby be promoted." *Id.*, at 215. This Court held *per curiam* that, given Washington's guarantee of the right to appeal to the accused in all criminal prosecutions, Wash. Const., Art. I, § 22 and Amend. 10, "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript," *id.*, at 216, and remanded the cause for further proceedings not inconsistent with the opinion. In response, in *Woods* v. *Rhay*, 54 Wash. 2d 36, 338 P. 2d 332 (1959), a case which was remanded by this Court for reconsideration in light of *Eskridge* two weeks after that case was decided, 357 U. S. 575, the Supreme Court of Washington formulated a new set of rules to govern trial judges in passing upon indigents' requests for free stenographic transcripts:

> "1. An indigent defendant in his motion for a free statement of facts must set forth:
>
> "a. The fact of his indigency
>
> "b. The errors which he claims were committed; and if it is claimed that the evidence is insufficient to justify the verdict, he shall specify with particularity in what respect he believes the evidence is lacking. (The allegations of error need not be expressed in any technical form but must clearly indicate what is intended.)
>
> "2. If the state is of the opinion that the errors alleged can properly be presented on appeal without a transcript of all the testimony,
>
> "a. it may make a showing of what portion of the transcript will be adequate, or
>
> "b. if it believes that a narrative statement will be adequate, it must show that such a statement is or will be available to the defendant.

"3. The trial court in disposing of an indigent's motion for a statement of facts at county expense shall enter findings of fact upon the following matters:

"a. The defendant's indigency

"b. Which of the errors, if any, are frivolous and the reasons why they are frivolous

"c. Whether a narrative form of statement of facts will be adequate to present the claimed errors for review and will be available to the defendant; and, if not

"d. What portion of the stenographic transcript will be necessary to effectuate the indigent's appeal.

"4. The trial court's disposition of the motion shall be by definitive order." 54 Wash. 2d, at 44–45, 338 P. 2d, at 337.

It is the application of these rules which is asserted by petitioners in the present case to be inconsistent with their constitutional rights as declared in the *Griffin* and *Eskridge* cases. Petitioners, who are concededly indigent, were each convicted of two counts of robbery by a jury and sentenced to two consecutive 20-year terms after a three-day trial ending on September 14, 1960, during which they were represented by court-appointed counsel. Their motions for new trials were denied. On October 20, acting *pro se*, they filed timely notices of appeal from the judgments of conviction, and then filed identical motions requesting the trial judge to order preparation of a free transcript of the record and statement of facts.[1] Drawn

[1] Washington practice refers to copies of the various documents filed with the clerk of the trial court as the "transcript of the record," Rule 44 of the Rules on Appeal, and to the court reporter's transcription of trial proceedings as the "statement of facts," Rule 35 of the Rules on Appeal. In accordance with common usage, the latter will often be referred to herein as the "transcript" and the "stenographic transcript."

inartistically, these requests asserted petitioners' indigency and then set forth 12 allegations of error in the trial, relating to admission of testimony and exhibits, perjured and self-contradictory testimony, prejudice of the trial judge in the conduct of the trial, failure to enforce the rule as to exclusion of witnesses, and failure of the evidence to establish the elements of the crime charged. Each concluded that "[u]nless Defendant is provided with a transcript and statement of facts at the county expense, he will be unable to prosecute this appeal."

Petitioners' motions were heard on November 28 by the judge who had presided at the jury trial. Petitioners were present at the hearing, having been brought from the State Penitentiary where they were and still are incarcerated. Although they no longer wished the aid of counsel, the judge, in accordance with a statement in *Woods* v. *Rhay*,[2] directed trial counsel to speak in petitioners' behalf. Counsel attempted, as best he could from his recollection of a trial which had occurred two and one-half months earlier, to elaborate upon the specifications of error in petitioners' motions. The objections to exhibits, he stated, related to a gun introduced against petitioner Draper, and a jacket, claimed to have been found with money in it, introduced as belonging to petitioner Lorentzen. Counsel explained at length that he regarded the foundation laid for introducing these items to have been extremely weak, and that receipt of the evidence on such a slim foundation was prejudicial. He suggested that petitioner Draper had been identified only by an alleged accomplice, Jennings, whose testimony was also contradictory and perjurious. Counsel also argued that

[2] "Where court-appointed counsel has represented the defendant at the trial, his services should be made available to the defendant for the purpose of presenting the motion." 54 Wash. 2d, at 44, n. 3, 338 P. 2d, at 337, n. 2.

the prosecution had failed to prove both the existence of the corporation which the indictment described as owning one of the robbed motels, and the possessory right of its agent to the money taken. "In my opinion," he said, "those two omissions are very important, if not fatal in this case." Further, counsel referred to petitioners' contention that two witnesses were improperly allowed to sit in the courtroom prior to testifying, and said that he had no personal knowledge of the facts supporting the contention but that since defendants had invoked the exclusion-of-witnesses rule at trial there was perhaps something to the contention. Finally, counsel argued that petitioners' contention that the evidence was insufficient to sustain the conviction was, under *Woods* v. *Rhay* and analogous decisions of this Court governing the rights of federal prisoners, enough in itself to entitle them to a transcript.

Since petitioners had not desired counsel's assistance, petitioner Draper was allowed to argue when counsel finished. He stated in a layman's way what he believed were the trial errors, but when interrogated by the trial judge for supporting details he asserted his inability to give any without a transcript.

The prosecutor opposed the motion both by affidavit and by argument at the hearing. His affidavit summarized in several paragraphs his contrary interpretation of the evidence, which according to him plainly established the defendants' guilt. In his argument he undertook to refute each of petitioners' assignments of error. He contended, therefore, that petitioners' motions for free transcripts and statements of facts should be denied because "there is nothing here to support any substantial claim of error whatsoever."

The trial judge, upon conclusion of the prosecutor's argument, reviewed petitioners' assignments of error and indicated orally that he would deny their motions. On

December 12 he entered an order, coupled with formal findings of fact and conclusions of law, in which he concluded

> "That the assignments of error as set out by each defendant are patently frivolous; that the guilt of each defendant as to each count of Robbery was established by overwhelming evidence, and that accordingly the furnishing of a statement of facts would result in a waste of public funds."

His findings summarized in six paragraphs the facts which he thought had been proven at the three-day trial. This summary constituted only the trial judge's conclusions about the operative facts, without any description whatsoever of the evidence upon which those conclusions were based. After stating these factual conclusions, the judge specifically rejected each of petitioners' 12 assignments of error with a summary statement—almost wholly conclusory—concerning each.

Petitioners sought review by certiorari of the trial court's order in the Supreme Court of Washington. Department One of that court quashed the writ, holding that the trial court had properly applied the principles of *Woods* v. *Rhay* and had correctly found the appeal to be frivolous. 58 Wash. 2d 830, 365 P. 2d 31. By the very nature of the procedure, the Supreme Court's ruling was made without benefit of reference to any portion of a stenographic transcript of the jury trial. Solely on the basis of the stenographic record of the hearing on the motion, the Supreme Court stated that "[i]t would serve no useful purpose to set forth . . . [the] evidence in detail," 58 Wash. 2d, at 832, 365 P. 2d, at 33, and instead purported to summarize the operative facts briefly, based entirely and uncritically on the trial judge's conclusions as to what had occurred. These conclusory statements, arrived at

without any examination of the underlying evidence, were then (inevitably, given the nature of the trial judge's conclusions) characterized as sufficient to show that all of the elements of the crime of robbery were established by the evidence.[3] The court concluded by briefly dealing with and rejecting petitioners' specific assignments of error, just as the trial judge had done.

Petitioners contend that the present Washington procedure for indigent appeals has not cured the constitutional defects disapproved in *Eskridge*. They argue that a standard which conditions effective appeal on a trial judge's finding, even though it be one of nonfrivolity instead of promotion of justice, denies them adequate appellate review. Under the present standard, just as under the disapproved one, they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal. Failing to convince the trial judge, they continue, they are denied adequate appellate review because the Supreme Court then passes upon their assignments of error without consideration of the record of the trial proceedings, whereas defendants with money to buy a tran-

[3] The State Supreme Court twice declared that the defendants had not challenged the trial court's recollection of the evidence, apparently implying that defendants had abandoned any claims resting on insufficiency of or inconsistencies in the evidence. However, the record, including the briefs filed in the State Supreme Court, does not support this conclusion. Petitioners' *pro se* brief in the State Supreme Court, such as it was, was based on the broad proposition that under *Griffin* and *Eskridge* they were entitled to a transcript in order to appeal, a pointless contention if by so stating the argument they meant to waive the right to have the State Supreme Court consider some or possibly all of the underlying allegations of error. Their vigorous arguments at the hearing on the transcript motion were meaningless if they were willing to accept the prosecution's version of the facts. It should be noted, however, that the State Supreme Court did, notwithstanding its comments, consider petitioners' assignments of error.

script are allowed a direct appeal to the Supreme Court, which affords them full review of their contentions. The State argues that this difference in procedure is justifiable because it safeguards against frivolous appeals by indigents while guaranteeing them appellate review in cases where such review is even of potential utility.[4]

In considering whether petitioners here received an adequate appellate review, we reaffirm the principle, declared by the Court in *Griffin,* that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U. S., at 20. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment

[4] The State also argues that in practical effect there is no difference at all between the rights it affords indigents and nonindigents, because a moneyed defendant, motivated by a "sense of thrift," will choose not to appeal in exactly the same circumstances that an indigent will be denied a transcript. We reject this contention as untenable. It defies common sense to think that a moneyed defendant faced with long-term imprisonment and advised by counsel that he has substantial grounds for appeal, as petitioners were here, will choose not to appeal merely to save the cost of a transcript. The State's procedure for indigents, therefore, cannot be justified as an attempt to equalize the incidence of appeal as between indigents and nonindigents.

upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted.[5] In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.

Petitioners' contentions in the present case were such that they could not be adequately considered by the State Supreme Court on the limited record before it. The arguments about improper foundation for introduction of the gun and coat, for example, could not be determined on their merits—as they would have been on a nonindigent's appeal—without recourse, at a minimum, to the portions of the record of the trial proceedings relating to this point.[6] Again, the asserted failure of proof with

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[5] For example, the State Supreme Court here held that, under Washington law, proof of the existence of the corporation robbed is unnecessary to a conviction for robbery, thus obviating the need for a record of the testimony relevant to this point.

[6] The Washington courts stated that the asserted lack of foundation went to the weight of the evidence and not to its admissibility. This conclusion, however, in contrast to the holding that the existence

respect to identification of the defendants and the allegations of perjury and inconsistent testimony were similarly impossible to pass upon without direct study of the relevant portions of the trial record. Finally, the alleged failure of the evidence to sustain the conviction could not be determined on the inadequate information before the Washington Supreme Court.

The materials before the State Supreme Court in this case did not constitute a "record of sufficient completeness," see *Coppedge* v. *United States,* 369 U. S. 438, 446, and p. 498, *infra,* for adequate consideration of the errors assigned. No relevant portions of the stenographic transcript were before it. The only available description of what occurred at the trial was the summary findings of the trial court and the counter-affidavit filed by the prosecutor. The former was not in any sense like a full narrative statement based upon the detailed minutes of a judge kept during trial. It was, so far as we know, premised upon recollections as of a time nearly three months after trial and, far from being a narrative or summary of the actual testimony at the trial, was merely a set of conclusions. The prosecutor's affidavit can by no stretch of the imagination be analogized to a bystander's bill of exceptions. The fact recitals in it were in most summary form, were prepared by an advocate seeking denial of a motion for free transcript, and were contested by petitioners and their counsel at the hearing on that motion.

By allowing the trial court to prevent petitioners from having stenographic support or its equivalent for presentation of each of their separate contentions to the

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of the robbed corporation was irrelevant as a matter of law, necessarily depended upon an examination—never made—of the appropriate portions of the record to test whether the evidence claimed to establish the foundation was in fact sufficient to meet the threshold standard of admissibility.

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appellate tribunal, the State of Washington has denied them the rights assured them by this Court's decisions in *Griffin* and *Eskridge*. The rules set out in *Woods* v. *Rhay* contemplate a procedure which could have been followed here to afford the petitioners what the Constitution requires. Thus, in accordance with those rules, the State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners' contentions. The trial judge would have complied with both the constitutional mandate and the rules in limiting the grant accordingly on the basis of such a showing by the State. What was impermissible was the total denial to petitioners of any means of getting adequate review on the merits in the State Supreme Court, when no such clog on the process of getting contentions before the State Supreme Court attends the appeals of defendants with money.

The Washington rules as applied here come to this: An indigent defendant wishing to appeal and needing a transcript to do so may only obtain it if the judge who has presided at his trial and has already overruled his motion for a new trial as well as his objections to evidence and to conduct of the trial finds that these contentions, upon which he has already ruled, are not frivolous. The predictable finding of frivolity is subject to review without any direct scrutiny of the relevant aspects of what actually occurred at the trial, but rather with examination only of what the parties argued at the hearing on the transcript motion and what the judge recalled and thereafter summarily found as to what went on at the trial.

This Court, in *Coppedge* v. *United States*, 369 U. S. 438, 446, dealt with similar vices in the federal courts by requiring that when a defendant denied leave to appeal *in forma pauperis* by the District Court applies to

the Court of Appeals for leave to appeal, that court, when the substance of the applicant's claims cannot be adequately ascertained from the face of his application (as in the present case), must provide a "record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed . . . *in forma pauperis* should be allowed." Here, similarly, the Washington Supreme Court could not deny petitioners' request for review of the denial of the transcript motion without first granting them a "record of sufficient completeness" to permit proper consideration of their claims. Such a grant would have ensured petitioners a right to review of their convictions as adequate and effective as that which Washington guarantees to nonindigents. Moreover, since nothing we say today militates against a State's formulation and application of operatively nondiscriminatory rules to both indigents and nonindigents in order to guard against frivolous appeals, the affording of a "record of sufficient completeness" to indigents would ensure that, if the appeals of both indigents and nonindigents are to be tested for frivolity, they will be tested on the same basis by the reviewing court. Compare *Ellis* v. *United States,* 356 U. S. 674; *Coppedge* v. *United States, supra,* 369 U. S., at 447–448.

In *Eskridge* this Court held that "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." 357 U. S., at 216. We hold today that the conclusion of the trial judge that an indigent's appeal is frivolous is a similarly inadequate substitute for the full appellate review available to nonindigents in Washington, when the effect of that finding is to prevent an appellate examination based upon

a sufficiently complete record of the trial proceedings themselves.

The judgment of the Washington Supreme Court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE WHITE, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

The Supreme Court of Washington in this case determined that the issues raised by petitioners in that court were without merit and frivolous. In my judgment petitioners were afforded an adequate appellate review upon a satisfactory record. Consequently, with all due deference, I dissent.

I.

The Court, as it should, *Griffin* v. *Illinois,* 351 U. S. 12, 20; *Eskridge* v. *Washington State Board,* 357 U. S. 214, 216; cf. *Johnson* v. *United States,* 352 U. S. 565; *Coppedge* v. *United States,* 369 U. S. 438, 446, carefully avoids requiring the State to supply an indigent with a stenographic transcript of proceedings in every case. It would permit the State to furnish an adequate record substantially equivalent to the transcript which could be purchased by an appellant with resources and would accept a narrative statement based upon the judge's notes or a bystander's bill of exceptions. By any of these standards articulated by the Court, however, I am quite unable to fathom why and in what respects the record placed before the Washington Supreme Court was not wholly satisfactory, just as the Washington Supreme Court determined that it was.

Following petitioners' conviction and the denial of the motion for a new trial, petitioners filed a motion before

the trial court setting forth their claimed errors and requesting a transcript for purposes of appeal. The State, opposing the request for a transcript, responded by presenting the evidence at the trial in a narrative form by affidavit of the prosecuting attorney. A hearing was held at which both the attorney who represented the petitioners at the trial and the petitioners themselves were free to challenge the accuracy of the State's narrative of the facts or to supplement it in any way. The statements and arguments of petitioners and their attorney at the hearing were included in the material before the Supreme Court and added considerably to the State's summary, as did the court's oral opinion and the colloquies between the court and petitioner Draper. Finally, the court, as it was required to do, entered findings of fact setting forth the evidence at the trial and ruling upon each error claimed by petitioners. The findings, as well as the court's statements during the conduct of the hearing, went substantially beyond the summary presented by the State and were expressly intended by the trial judge to set forth the "substance of the testimony" so that the matters relied upon by petitioners could be presented to the Washington Supreme Court.

We thus have a situation where the court, in good faith, utilizing its own knowledge and information about the trial and with the help of the State, the defendants and their counsel, in effect prepared and settled a narrative statement of the evidence for the use of the appellate court in passing upon the merits of the alleged errors. The record before the Washington Supreme Court contained not only the findings made by the trial judge after a hearing, but also everything said at the hearing by the defendants, by their attorney and by the prosecutor. Furthermore, briefs were filed in the Supreme Court of Washington and the court heard oral argument by appointed counsel.

If the Court would accept a narrative statement based upon the judge's notes, I am at a loss to understand why the above procedure does not satisfy the Court's own requirements, particularly when throughout this entire proceeding neither the petitioners nor their attorney challenged the accuracy of any statement in the summary prepared by the trial court and when every opportunity was given them to add to this record. While claiming generally that a transcript was required and in effect insisting that the jury should not have believed the evidence, not once did the petitioners or their attorney in the trial court or in this Court indicate in what particulars the record made by the judge with the participation of the parties was inaccurate or inadequate for the purposes of appeal.

The Court also says that a bystander's bill of exceptions would suffice. But a bystander's bill is nothing more than a bill of exceptions prepared by the party appealing and certified by a bystander where the judge refuses or is unable so to certify. See, *e. g., Cartwright* v. *Barnett,* 192 Ark. 206, 90 S. W. 2d 485; *McKee* v. *Elwell,* 67 Colo. 149, 186 P. 714. And, as said by a unanimous Court:

> "Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked." *Miller* v. *United States,* 317 U. S. 192, 198.

Furthermore, in the *Miller* case the Court expressly observed that "counsel [for petitioners] could, therefore, have prepared and presented to the trial judge, *as was his duty,* a bill of exceptions so prepared, and it would then have become the duty of the trial judge to approve it, if accurate, or, if not, to assist in making it accurately reflect the trial proceedings." *Id.*, at 199 (emphasis supplied). The State of Washington here did not leave it solely to the defendant or his counsel to prepare the appellate record in the first instance. Upon motion by the defendants, the court proceeded, giving every opportunity to the parties to participate, to prepare a "statement with respect to the evidence adequate to present the contentions made in the appellate court." *Id.*, at 198.

Under any standard enunciated by this Court, then, the materials before the Supreme Court afforded ample basis for passing upon petitioners' claims. The conclusion of the Supreme Court of Washington, likewise, was that the record before it was adequate for review. Its judgment was that the appeal was frivolous and that no stenographic transcript was required to dispose of it. I think the court was correct—as an examination of the alleged errors in the light of the record supplied will demonstrate.

II.

The errors alleged by petitioners were as follows:

"(1) Testimony of witnesses contradict each other on the identification of the defendants.

"(2) Identification of clothes and weapons in error, no continuency of possession shown, nor ownership established, nor was ownership of these articles by the Defendants proven.

"(3) Testimony of many witnesses in direct conflict with each other and at times contradict each

other, as to what happened and how it happened and by whom it was done.

"(4) That one witness perjured himself repeatedly and that his testimony was not stricken or thrown out.

"(5) That the presumption of innocence was never afforded the Defendants.

"(6) That the trial Judge was prejudiced against the Defendants throughout the entire trial.

"(7) That the trial Judge should have dismissed the case as the Defendants are not guilty as charged.

"(8) That exhibits were entered over objections that should not have been allowed to be entered.

"(9) That testimony was allowed over objections that should not have been allowed.

"(10) That Defendant was charged with robbing two specific companies that in fact were never proven to have been robbed.

"(11) That the Defendant was forced to sit at the same table with the two prosecutors and a policeman that was subpoenaed as a witness.

"(12) That after an order excluding witnesses from the courtroom the two main witnesses sat in the courtroom prior to testifying which had a substantial bearing on their testimony.

"(13) Unless Defendant is provided with a transcript and statement of facts at the county expense, he will be unable to prosecute this appeal."

The Court places special emphasis on points 1, 2, 3, 4 and 7 as requiring considerably more than the Washington Supreme Court had before it if a constitutionally adequate review was to be afforded the petitioners.

However, point 1 merely asserts contradictions in the testimony about the identification of the petitioners. Inconsistency in the evidence is no stranger to criminal trials and it is the task of the jury to sort out the testi-

mony and determine the facts and the guilt or innocence of the defendants. A conflict of testimony "presents but a mere question of fact, upon which the verdict of the jury is conclusive. It is enough to sustain the verdict that there was positive, direct testimony to the existence of the facts as found." *Corinne Mill, Canal & Stock Co.* v. *Toponce,* 152 U. S. 405, 408. See generally *Galloway* v. *United States,* 319 U. S. 372; *Gunning* v. *Cooley,* 281 U. S. 90. Accordingly, if a complete transcript of the trial had been placed before the Washington Supreme Court, the bare fact of inconsistency between witnesses would be quite beside the point. The governing question would be whether there was adequate evidence to support the jury's conclusion that the petitioners had indeed been identified and were guilty as charged. Here the record supplied shows that the accomplice Jennings identified the petitioners and this was even confirmed by his mother. Thus neither point 1 nor point 3 would raise any problem for an appellate review of the finding of guilt by the jury.

Point 2 questions the admissibility of a gun and a jacket because of insufficient identification. But as petitioners' own attorney pointed out, the gun was identified by the accomplice Jennings, and petitioner Lorentzen's jacket was found in the get-away car which belonged to Lorentzen and was identified as looking like the one which Lorentzen wore during the commission of the crimes. The trial court ruled that the items had been adequately identified and were admissible under Washington law and that the objections of the defendants, as to the positiveness of the identification, went to the weight, rather than to the admissibility, of the evidence. The Supreme Court of Washington agreed. I doubt seriously the propriety and wisdom of questioning the judgment of the Washington Supreme Court as to what evidence is necessary to support the admissibility of an exhibit under Washington law.

The Court apparently makes much of point 4, a general allegation of perjury, as not being intelligently reviewable upon the record made. This appears wholly untenable in the circumstances of this case. Here the trial was over, the evidence was concluded and the record closed. The jury had heard any attack the petitioners had to offer upon the credibility of the State's witnesses and had weighed the evidence and convicted the petitioners. A motion for a new trial had been denied. On the record made at the trial it was the jury's task to determine whether any witness was telling the truth and to accept or discard his testimony. The petitioners raised no issue of perjury at the trial or in their motion for a new trial. In these circumstances, it would take evidence outside the normal reporter's transcript to prove perjury, evidence which the trial court found they did not have, see *United States* v. *Johnson,* 327 U. S. 106, and evidence which could not be presented for the first time on direct appeal upon the record of a trial already made. "[N]ew evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial." *Mesarosh* v. *United States,* 352 U. S. 1, 9; *State* v. *Brooks,* 89 Wash. 427, 154 P. 795. A reporter's transcript might help petitioners prove that perjury had been committed at their trial but such proof would have to be made, if at all, not on direct appeal, but in some other proceeding.

Point 4 also shares the difficulties inherent in points 3, 8 and 9, all of which are blanket allegations lacking any specificity. It would seem that in order to make these general assertions at all, it was necessary for petitioners to have at least some specific instances in mind, but neither the petitioners nor their attorney in any way (except as point 2 illuminates point 8) brought to the court's attention any particular instances of the kind generally alleged in these points. These contentions placed nothing before

the appellate court for review, see, *e. g., Seaboard Air Line R. Co.* v. *Watson,* 287 U. S. 86; *Erdmann* v. *Henderson,* 50 Wash. 2d 296, 311 P. 2d 423; *Nordlund* v. *Pearson,* 91 Wash. 358, 157 P. 875, and if they are not to be disregarded the net effect would be to require a complete transcript in every case, contrary to the Court's own standards and contrary to the rules of *Woods* v. *Rhay,* 54 Wash. 2d 36, 338 P. 2d 332, which the Court in general approves.

As for point 7, which essentially challenges the sufficiency of the evidence to support a conviction, the trial court found the evidence overwhelming and the Washington Supreme Court considered the evidence in the record placed before it as wholly adequate. The findings of the trial court are attached as an Appendix, *post,* p. 509, and it is incredible to me that the Court would hold this statement of the evidence at the trial to be an insufficient record upon which to affirm a jury's conclusion that the petitioners were guilty of robbing two motels.

The Washington Supreme Court determined as a matter of law that point 10 was without merit since to prove the crime in this case it was unnecessary to prove the existence of the corporation and the ownership of the money. See note 5 of the Court's opinion, *ante,* p. 496. Similarly, point 6 was untenable since the only ground for the assertion of prejudice was that the trial judge made rulings adverse to them at the trial and since the challenge for prejudice was neither within the time nor in the form required by Washington law. As to point 5, the trial court found that the jury was specifically instructed in two different instructions as to the presumption of innocence and the burden of proof, the jury also being further reminded by counsel of the presumption of innocence in the selection of the jury. The Supreme Court of Washington held that this was enough under Washington law.

It is also readily apparent that the transcript demanded by petitioners would be of no aid at all in disposing of

points 11 and 12, since a transcript would not show who was or was not in the courtroom or what prejudice, if any, was suffered by the defendants by being seated at the same table with the prosecutor, which physical arrangement is normal in the trial court which tried petitioners.

Finally, it was found by the trial court that points 1, 3, 4, 5, 6, 11 and 12 were never presented to the trial court at any stage of the trial or judgment and sentence in any form or fashion and, therefore, as the Supreme Court of Washington ruled, "even if these assignments were meritorious, our rules would preclude a consideration of them."

I think the record was adequate in this case. If it could have been better, it should not pass without comment that it is normally the lot of the appellant to take the initiative in preparing and presenting a record for appeal. If petitioners' counsel could have been of more help in preparing this record—and this does not appear to have been true here—the petitioners themselves must shoulder the blame, since they repeatedly stated that they did not want the help of appointed counsel, giving no reason whatsoever other than that they desired to represent themselves. Petitioners were notified prior to the hearing on their motion for a transcript that trial counsel was available. Their immediate response to the judge was that they did not desire counsel's help and that they would represent themselves. Petitioner Draper repeated these assertions at the hearing. While the court gave Draper every opportunity to represent himself and the other petitioners in connection with making this record, he also required petitioners' trial counsel to be present to support the petitioners' position. This counsel did and it appears that both at the hearing and upon appeal where he orally argued, he placed his resources and abilities at the disposal of petitioners.

## III.

I am satisfied therefore that there has been no constitutional infirmity in the review afforded these petitioners by the State of Washington. The contrary ruling of the Court severely limits the power of the States to avoid undue expense in dealing with criminal appeals. It places their appellate processes in an inflexible procedural straitjacket. No greater harm could befall the principles of the *Griffin* and *Eskridge* cases than to require their indiscriminate application to situations where they are inapposite. The principles of these cases will not be served by an inquisitorial approach in this Court to their administration by state courts. To me the case before us amply demonstrates that the Washington courts have been faithful to the mandate of *Griffin* and *Eskridge* and I would affirm.

## APPENDIX TO OPINION OF MR. JUSTICE WHITE.

In the Superior Court of the State of Washington
in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

*v.*

RAYMOND L. LORENTZEN, ROBERT DRAPER AND JAMES D. LONG, DEFENDANTS

*Findings of fact and conclusions of law*

December 12, 1960

The above entitled cause came regularly on for hearing on the 28th day of November, 1960, on the motion of each defendant in forma pauperis for a free transcript and

statement of facts, each defendant being personally present in Court and Thomas F. Lynch appearing as Court appointed counsel for each defendant, and Frank H. Johnson, Deputy Prosecuting Attorney appearing as counsel for the plaintiff, and the Court having examined the files and affidavits and having heard the argument of counsel and the individual argument of the defendant, Robert A. Draper, the Court being fully advised in the premises, now, makes findings of fact as follows:

FINDINGS OF FACT

I

That each defendant was jointly charged by information filed in the Superior Court of Spokane County, with two counts of Robbery and said defendants were jointly tried before jury in the above entitled Court on September 12th, 13th and 14th, 1960.

II

That on September 14, 1960, the jury rendered verdicts of guilty as to each defendant on both counts of the information; that each of said defendants were thereafter on September 30, 1960, sentenced to serve not more than 20 years in the Washington State Penitentiary on each count, said sentences to run consecutively.

III

That the evidence established that the TraveLodge Motel is owned and operated as a motel business in Spokane, Washington, by a partnership consisting of H. E. Swanson, Dr. C. M. Anderson, and the TraveLodge Corporation, Inc., a corporation, who do business as a copartnership under the name of the TraveLodge Motel; that at approximately 1:50 a.m., of July 5, 1960, Robert Deurbrouck was the employee of the TraveLodge Motel

and the night clerk in charge of the property and business of the TraveLodge Motel; that at that time and place the defendants, Raymond Lorentzen and James D. Long, entered the TraveLodge Motel each armed with a loaded gun and at gunpoint took from Robert Deurbrouck the approximate sum of $500.00 in lawful money of the United States which was the property of and belonged to the TraveLodge Motel; that the defendant, James D. Long, then struck Robert Deurbrouck on the back of the head with the gun held by the said James D. Long, and inflicted upon the said Robert Deurbrouck, a scalp wound which required four stitches to close.

IV

That the defendants, Raymond Lorentzen and James D. Long, then ran to an automobile waiting outside the TraveLodge Motel in which by prearrangement, the defendant, Robert Draper, was driving said automobile, which belonged to the defendant, Raymond Lorentzen, and in which the accomplice Robert Jennings, also waited; that the defendant Robert Draper by prearrangement then drove said automobile to the DownTowner Motel which is a corporation engaged in the motel business; that the defendant James Long and the accomplice Robert Jennings, then entered the DownTowner Motel each armed with a loaded gun and the accomplice held up the night clerk and employee of the DownTowner Motel, one Barry Roff, who was then in charge of, the business and property of the DownTowner Motel and took by force and violence, the approximate sum of $1800.00 in lawful money of the United States, the property of the DownTowner Motel, Inc., a corporation; that the accomplice, Robert Jennings, then struck the said Barry Roff over the back of the head with the gun held and used by the said Robert Jennings; that the defendant, James Long, and the said accomplice, Robert Jennings thereupon ran to

the waiting automobile which the defendant Robert Draper was driving, and in which the defendant Raymond Lorentzen was waiting.

V

That as Raymond Lorentzen and Robert Jennings ran from the DownTowner Motel to the aforementioned waiting automobile, they were observed by police officer Donald Rafferty, who was on duty as a police officer in the downtown area of Spokane at that time; that officer Rafferty then followed said defendants for a few blocks until he was advised by the police radio on his vehicle, of the above described robbery of the DownTowner Motel; that he thereupon attempted to stop the vehicle in which the above three defendants and the accomplice Robert Jennings were riding, but the defendant, Robert Draper, accelerated his vehicle and attempted to flee; that officer Rafferty then gave chase to this vehicle through downtown streets of Spokane at speeds up to 60 miles per hour and was joined in this pursuit by another police car driven by officer Robert Bailor; that in the course of this pursuit, the defendants fired an unknown number of shots at the pursuing police vehicles; that at the intersection of Third and Wall Streets in Spokane, the vehicle occupied by the defendants was rammed from behind by the police car driven by officer Bailor which caused the defendants' vehicle to go out of control and stop in a parking lot on the northeast corner of Third and Wall Streets in Spokane.

VI

That the defendants, James Long and Raymond Lorentzen, were each apprehended in this vehicle with the proceeds of the aforementioned robberies including envelopes, receipts, and papers identified as belonging to and

coming from the said motels recovered in said vehicle. The defendant James D. Long immediately thereafter admitted his participation in the above described robberies.

VII

That the defendant, Robert Draper, and the accomplice, Robert Jennings, fled from said vehicle and returned to the Davenport Hotel in Spokane, Washington, in which Robert Draper had rented a room under the name "J. Radde;" that at approximately noon of July 5, 1960, the defendant, Robert Draper, left the Davenport Hotel and flew to Seattle on a Northwest Air Lines, commercial plane, where he was apprehended several days later with the passenger's flight coupon still in his possession; that said passenger's flight coupon is in evidence as exhibit 26 and 26a, and that the Davenport Hotel registration of the defendants, Raymond Lorentzen, James Long, and Robert Draper, the latter using the name of "J. Radde," is in evidence as exhibits 23, 24 and 25.

VIII

That the accomplice, Robert Jennings, entered a plea of guilty to the aforementioned two counts of Robbery in the Superior Court of Spokane County, on July 19, 1960, and was sentenced by the Honorable Louis F. Bunge, Judge of the above entitled Court, to not more than 20 years confinement in the Washington State Penitentiary on each count, said sentence to run consecutively; that the said Robert Jennings testified as a witness for the State at the trial of the three co-defendants, and testified that the three defendants had driven to Robert Jennings' home near Addy, Washington, approximately 60 miles north of Spokane, in the late afternoon of July 4, 1960, and that the defendants persuaded him to return to Spokane with said defendants; that said testimony was

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confirmed by testimony of Mrs. Gladys Allen, the mother of the said Robert Jennings; that said Robert Jennings further testified that the robberies of the TraveLodge Motel and the DownTowner Motel were jointly planned by the three defendants and himself in the Davenport Hotel room occupied by the defendant, Robert Draper, approximately several hours before the robberies; that the four men then travelled the route later taken in the actual robberies for the purpose of planning and timing said robberies.

IX

That when the State rested its case in chief, the defendants rested their case without taking the witness stand or offering any evidence.

X

That the motions of each defendant for free transcript and statement of fact are identical in substance and the Court finds each assignment of error by each defendant without merit as follows:

"A. That, as to assignments of error one and three, no showing whatever has been made of any conflict or contradiction in the testimony of any witness and the Court finds that no such material conflict or contradiction was present in the trial.

"B. As to assignments of error two and eight, relating to identification and admission of exhibits, each exhibit was properly identified at the trial and was material and relevant to the issues and that the objection to exhibit two, the gun identified by the accomplice Robert Jennings, as one used in the holdup, as well as the objections to remaining exhibits offered, goes to the weight the jury should place upon the exhibits rather than their admissibility.

"C. As to assignment of error number four, no showing of any perjury has been made beyond the bare assertion

by the defendants of perjury, and the Court finds there is no basis in fact that has been presented to establish such claim.

"D. As to assignment of error five, the Court finds that the jury was specifically instructed in instructions number two and four, as to the presumption of innocence and the burden of proof, and the jury was further reminded by counsel in the selection of the jury of said matters.

"E. As to assignment of error number six, no showing whatever has been made of any prejudice against the defendants, and no such prejudice existed.

"F. As to assignment of error number seven, the Court finds the evidence offered by the State against these defendants overwhelming as to their guilt of the crimes charged.

"G. As to assignment of error number nine, no showing has been made by these defendants as to any testimony that was improperly admitted, and the Court finds that no such testimony was admitted.

"H. As to assignment of error number ten, the Court finds that the uncontradicted evidence of the State has established the legal nature of each motel business and the ownership of the property that was taken in the robberies, by the employees of said business, and one of the owners and co-partners of the TraveLodge Motel, Mr. H. E. Swanson.

"I. As to assignment of error number eleven; that all counsel and defendants at this trial participated therein from one counsel table adequate to provide all parties with necessary working room, and that no conceivable prejudices resulted to these defendants from such fact, and that no demonstration by any participant in the trial was evident to the Court or ever brought to the attention of the Court during any time of the trial.

"J. As to assignment of error number twelve, the Court finds that its attention was never called to the presence

of any witnesses in the courtroom after the rule of exclusion had been invoked, and to the Court's knowledge, no such witnesses were present in Court except when they testified and that, if such presence were established, no showing of prejudice to the defendants has been made."

XI

The Court further finds that assignments of error, one, three, four, five, six, eleven and twelve were never presented to the Court at any stage of the trial or judgment and sentence in any form or fashion.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I

That the claims of error of each defendant are frivolous, groundless and without any basis in fact or law.

II

That the defendants do not allege or substantiate any factual basis for their assignments of error beyond the bare assertion of such claims.

III

That the assignments of error as set out by each defendant are patently frivolous; that the guilt of each defendant as to each count of Robbery was established by overwhelming evidence, and that accordingly the furnishing of a statement of facts would result in a waste of public funds.

Done in open court this 12th day of December, 1960.

HUGH H. EVANS,
*Judge.*

Per Curiam.

## GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, ET AL. *v.* RISS & COMPANY, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 180. Argued February 19, 1963.—Decided March 18, 1963.

Predicating jurisdiction on § 301 of the Labor Management Relations Act, 1947, petitioners, a union and six of its members, sued in a Federal District Court to compel respondent to comply with a ruling of the Joint Area Cartage Committee directing that the individual petitioners be reinstated with full seniority and back pay. They alleged that the Committee's ruling had been handed down in accordance with grievance procedures established in a collective bargaining agreement between the union and the employer and that it was final and binding. After filing its answer, respondent moved to dismiss the complaint for want of jurisdiction. The District Court granted the motion on the pleadings as supplemented at pretrial conference by excerpts from the Local Cartage Agreement between the union and the employer. *Held:* It erred in doing so, since the District Court would have jurisdiction under § 301, if the award of the Joint Area Cartage Committee is final and binding under the collective bargaining agreement, as petitioners allege; and this allegation cannot be rejected on the basis merely of what the present record shows. Pp. 517–520.

298 F. 2d 341, reversed and cause remanded.

*David Previant* argued the cause for petitioners. With him on the brief were *Herbert S. Thatcher* and *Ralph H. Logan.*

*H. Bemis Lawrence* argued the cause and filed a brief for respondent.

PER CURIAM.

Petitioners are a union and six of its members employed by the respondent interstate motor freight common carrier. The present action was brought in the

United States District Court for the Western District of Kentucky, and jurisdiction was predicated on § 301 of the Labor Management Relations Act, 1947, 29 U. S. C. § 185. In their complaint, petitioners alleged that the respondent had refused to comply with a ruling of the Joint Area Cartage Committee, directing that the individual petitioners be reinstated with full seniority and back pay. The Committee's ruling was asserted to have been handed down in accordance with the grievance procedures established in the collective bargaining agreement between the union and the employer. The relief demanded in the complaint included the reinstatement of the individual petitioners, with full back pay and fringe benefits to the time of reinstatement.

Respondent, after filing its answer, moved to dismiss the complaint. The District Court granted the motion on the pleadings as supplemented at pretrial conference by excerpts from the Local Cartage Agreement between the union and the employer. The District Court's ground for dismissing the complaint was want of federal jurisdiction, a result deemed compelled by our decision in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U. S. 437. The Court of Appeals for the Sixth Circuit affirmed, 298 F. 2d 341, but added two more grounds in support of the order of dismissal: (1) That the determination of the Joint Area Cartage Committee was not an arbitration award and so not enforceable under § 301; (2) That on the merits petitioners were not entitled to the relief ordered by the Joint Area Cartage Committee. We granted certiorari, 371 U. S. 810. We reverse and remand to the District Court for trial.

According to the allegations of the complaint, the six individual petitioners were discharged because they chose to respect and did respect a picket line established by another union at a place of business of

respondent. Contending that such discharge violated Article IX of the Local Cartage Agreement, which provides in part that "it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union . . . ," petitioners invoked the grievance machinery set up by the Agreement, and processed their grievances through the provided channels culminating in the Joint Area Cartage Committee's determination. Article VIII, § 1 (e), of the Agreement provides: "It is agreed that all matters pertaining to the interpretation of any provisions of this contract shall be referred, at the request of any party at any time, for final decision to the Joint Area Cartage Committee . . . ."

If, as petitioners allege, the award of the Joint Area Cartage Committee is under the collective bargaining agreement final and binding, the District Court has jurisdiction under § 301 to enforce it, notwithstanding our *Westinghouse* decision. See *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456, n. 6; *United Steelworkers* v. *Pullman-Standard Car Mfg. Co.,* 241 F. 2d 547, 551–552 (C. A. 3d Cir. 1957). Plainly, this allegation cannot be rejected on the basis merely of what the present record shows. It is not enough that the word "arbitration" does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564, 566; cf. *Retail Clerks* v. *Lion Dry Goods, Inc.,* 369 U. S. 17. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. *American Mfg. Co., supra,* at 567–568.

Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under § 301 to enforce it will lie. Then, should petitioners seek to pursue the action as a § 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions. We need not reach those questions here. But since the courts below placed so much reliance on the *Westinghouse* decision, we deem it appropriate to repeat our conclusion in *Smith* v. *Evening News Assn.*, 371 U. S. 195, 199, that "subsequent decisions . . . have removed the underpinnings of *Westinghouse* and its holding is no longer authoritative as a precedent."

*Reversed and remanded.*

## COLE ET AL. *v.* MANNING, PENITENTIARY SUPERINTENDENT.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 610, Misc. Decided March 18, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 240 S. C. 260, 125 S. E. 2d 621.

*Theodore W. Law, Jr.* for appellants.

*Daniel R. McLeod,* Attorney General of South Carolina, and *Victor S. Evans,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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## CRAIG *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 841, Misc. Decided March 18, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

## FIELDS ET AL. *v.* SOUTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 399. Decided March 18, 1963.

Certiorari granted; judgment vacated; and case remanded.

Reported below: 240 S. C. 366, 367, 368, 369, 370, 371, 372, 126 S. E. 2d 6, 7, 8, 9.

*Jack Greenberg, Constance Baker Motley, Matthew J. Perry* and *Lincoln C. Jenkins, Jr.* for petitioners.

*Daniel R. McLeod,* Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *Julian S. Wolfe* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Supreme Court of South Carolina is vacated and the case is remanded for consideration in light of *Edwards* v. *South Carolina,* 372 U. S. 229.

MR. JUSTICE CLARK dissents for the reasons expressed in his dissenting opinion in *Edwards* v. *South Carolina, supra.*

## LOCAL LODGE NO. 1836, DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* LOCAL NO. 1505, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 419. Decided March 18, 1963.

Judgment vacated and case remanded to District Court with directions to dismiss the cause as moot.

Reported below: 304 F. 2d 365.

*Robert M. Segal* and *Plato E. Papps* for petitioners.

*Paul F. Hannah* for Raytheon Company, respondent.

PER CURIAM.

The motion to vacate is granted. The judgment of the United States Court of Appeals for the First Circuit is vacated and the case is remanded to the United States District Court for the District of Massachusetts with directions to dismiss the cause as moot. *Black* v. *Amen*, 355 U. S. 600.

## BIRMINGHAM ICE & COLD STORAGE CO. ET AL. *v.* SOUTHERN RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 425. Decided March 18, 1963.

Appeal dismissed.

Reported below: 205 F. Supp. 640.

*David J. Vann* and *A. Alvis Layne* for appellants.

*Jos. F. Johnston* for Southern Railway Co. et al., and *James W. Wrape* and *Glenn M. Elliott* for Jefferson Warehouse & Cold Storage Co. et al., appellees.

*Solicitor General Cox* filed a memorandum for the United States.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

## JEFFERSON WAREHOUSE & COLD STORAGE CO. ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 617. Decided March 18, 1963.

205 F. Supp. 640, affirmed.

*James W. Wrape, James N. Clay III* and *Richard A. Bishop* for appellants.

*Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Alan S. Rosenthal* and *Pauline B. Heller* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

## WALKER *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

No. 657. Decided March 18, 1963.

208 F. Supp. 388, affirmed.

*Henry W. Moursund, Maynard F. Robinson* and *R. Dean Moorhead* for appellant.

*Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel* and *Robert W. Ginnane* for the United States et al., and *George Nokes, Roland Rice, Carl Wright Johnson* and *Nat L. Hardy* for Central Freight Lines Inc. et al., appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

## ROBINSON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 425, Misc. Decided March 18, 1963.

Certiorari granted; judgment vacated; and case remanded with directions to allow appeal *in forma pauperis*.

Reported below: 304 F. 2d 805.

Petitioner *pro se*.

*Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Kirby W. Patterson* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. On writ of certiorari the judgment is vacated and, in accordance with the suggestion of the Solicitor General, the case is remanded to the United States Court of Appeals for the Eighth Circuit with directions to allow the appeal *in forma pauperis*. *Coppedge* v. *United States*, 369 U. S. 438.

# LYNUMN *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 9. Argued February 19, 1963.—Decided March 25, 1963.

Petitioner was tried in an Illinois State Court, convicted of the unlawful possession and sale of marijuana, and sentenced to imprisonment. Her conviction was sustained by the State Supreme Court, notwithstanding the admission in evidence at her trial of an oral confession obtained by threats of police officers that, if she did not "cooperate," she would be deprived of state financial aid for her dependent children and that her children would be taken from her and she might never see them again. *Held:* Petitioner's confession was coerced; its admission in evidence violated the Due Process Clause of the Fourteenth Amendment; and the judgment affirming her conviction is reversed. Pp. 529–538.

1. Petitioner's confession, made in the circumstances shown by this record, was coerced. Pp. 529–534.

2. In view of a certification to this Court by the State Supreme Court that "decision of the federal claim . . . was necessary to our judgment in this case," it cannot be said that petitioner failed properly to assert or preserve that claim at her trial and that, therefore, her conviction rests upon an adequate and independent state ground. Pp. 535–536.

3. It cannot be said that petitioner's conviction did not rest in any part on her confession, because the record affirmatively shows that her confession was admitted in evidence and considered by the trial and appellate courts. P. 536.

4. Admission of petitioner's coerced confession in evidence was not harmless error, even if the other evidence was sufficient to support her conviction. Pp. 536–538.

21 Ill. 2d 63, 171 N. E. 2d 17, reversed.

*Jewel Lafontant* argued the cause and filed a brief for petitioner.

*William C. Wines,* Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William G. Clark,* Attorney General, and *Raymond S. Sarnow, A. Zola Groves* and *Edward A. Berman,* Assistant Attorneys General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was tried in the Criminal Court of Cook County, Illinois, on an indictment charging her with the unlawful possession and sale of marijuana. She was convicted and sentenced to the penitentiary for "not less than ten nor more than eleven years." The judgment of conviction was affirmed on appeal by the Illinois Supreme Court. 21 Ill. 2d 63, 171 N. E. 2d 17. We granted certiorari. 370 U. S. 933. For the reasons stated in this opinion, we hold that the petitioner's trial did not meet the demands of due process of law, and we accordingly set aside the judgment before us.

On January 17, 1959, three Chicago police officers arrested James Zeno for unlawful possession of narcotics. They took him to a district police station. There they told him that if he "would set somebody up for them, they would go light" on him. He agreed to "cooperate" and telephoned the petitioner, telling her that he was coming over to her apartment. The officers and Zeno then went to the petitioner's apartment house, and Zeno went upstairs to the third floor while the officers waited below. Some time later, variously estimated as from five to 20 minutes, Zeno emerged from the petitioner's third floor apartment with a package containing a substance later determined to be marijuana. The officers took the package and told Zeno to return to the petitioner's apartment on the pretext that he had left his glasses there. When the petitioner walked out into the hallway in response to Zeno's call, one of the officers seized her and placed her under arrest.[1] The officers and

[1] Officer Sims testified as follows: "He called Beatrice and said he had left his glasses in the apartment; she opened the door and as she came out into the hall, I was standing in the common hall, in the vestibule part with the door partly closed. As she walked down the hallway toward Zeno, I opened the door and stepped into the hall-

Zeno then entered the petitioner's apartment.[2] The petitioner at first denied she had sold the marijuana to Zeno, insisting that while he was in her apartment Zeno had merely repaid a loan. After further conversations with the officers, however, she told them that she had sold the marijuana to Zeno.

The officers testified to this oral confession at the petitioner's trial, and it is this testimony which, we now hold, fatally infected the petitioner's conviction. The petitioner testified at the trial that she had not in fact sold any marijuana to Zeno, that Zeno had merely repaid a long-standing loan.[3] She also testified, however, that she

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way. I told her she was under arrest and I grabbed her by her hands, both hands. At this point, I told her that she had been set up, that she had just made a sale and I showed her the package."

[2] Officer Sims testified: "I had complete physical possession of her two hands. I had turned her hands loose when we went into the apartment. I went in ahead of her. The door was still open. The apartment door was still ajar and I walked into the apartment and she followed me in. We were together but I was beside her. I believe Bryson and Zeno were behind her. She was between two police officers. We proceeded in that fashion to enter her apartment."

[3] Her testimony on this subject was as follows: "On January 17th Zeno called me. He owed me money, $23.00. I had loaned him this money about three months previously. He said he was being evicted and had money en route from his sister and if I could lend him the money, he could pay his rent; and I haven't seen him since. That was three months previously. On this day he told me on the phone he was sorry he had not been around to pay the money but he had been in pretty bad shape. But now he had come into some money and would come and pay me.

. . . . . .

". . . On that day I did not give to Zeno, nor did Mr. Zeno ask me in the telephone conversation in which he said he was going to pay me the money he owed me, he did not say anything about having a can ready for him or anything like that.

"He said here is the money I owe you. He owed me $23.00. When he gave me the money, he gave me $28.00. I asked him what the $5.00 was for and he said it was because I had it so long. I did not

had told the officers on the day of her arrest that she had sold Zeno marijuana, describing the circumstances under which this statement was made as follows:

> "I told him [Officer Sims] I hadn't sold Zeno; I didn't know anything about narcotics and I had no source of supply. He kept insisting I had a source of supply and had been dealing in narcotics. I kept telling him I did not and that I knew nothing about it. Then he started telling me I could get 10 years and the children could be taken away, and after I got out they would be taken away and strangers would have them, and if I could cooperate he would see they weren't; and he would recommend leniency and I had better do what they told me if I wanted to see my kids again. The two children are three and four years old. Their father is dead; they live with me. I love my children very much. I have never been arrested for anything in my whole life before. I did not know how much power a policeman had in a recommendation to the State's Attorney or to the Court. I did not know that a Court and a State's Attorney are not bound by a police officer's recommendations. I did not know anything about it. All the officers talked to me about my children and the time I could get for not cooperating. All three officers did. After that conversation I believed that if I cooperated with them and answered the questions the way they wanted me to answer, I believed that I would not be prosecuted. They had said I had better say what they wanted me to, or I would lose the kids. I said I would say anything they wanted me to say. I asked what I was to say. I was told to

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say to Mr. Zeno let's go into the kitchen. Nothing like that. I did not have any transaction with him in the kitchen nothing even like that."

say 'You must admit you gave Zeno the package' so I said, 'Yes, I gave it to him.'

. . . . . .

". . . The only reason I had for admitting it to the police was the hope of saving myself from going to jail and being taken away from my children. The statement I made to the police after they promised that they would intercede for me, the statements admitting the crime, were false.

. . . . . .

". . . My statement to the police officers that I sold the marijuana to Zeno was false. I lied to the police at that time. I lied because the police told me they were going to send me to jail for 10 years and take my children, and I would never see them again; so I agreed to say whatever they wanted me to say."

The police officers did not deny that these were the circumstances under which the petitioner told them that she had sold marijuana to Zeno. To the contrary, their testimony largely corroborated the petitioner's testimony. Officer Sims testified:

"I told her then that Zeno had been trapped and we asked him to cooperate; that he had made a phone call to her and subsequently had purchased the evidence from her. I told her then if she wished to cooperate, we would be willing to recommend to the State leniency in her case. At that time, she said, 'Yes, I did sell it to him.'

. . . . . .

". . . While I was talking to her in the bedroom, she told me that she had children and she had taken the children over to her mother-in-law, to keep her children.

"Q. Did you or anybody in your presence indicate or suggest or say to her that her children would be taken away from her if she didn't do what you asked her to do?

"Witness: I believe there was some mention of her children being taken away from her if she was arrested.

"The Court: By whom? Who made mention of it?

"The Witness: I believe Officer Bryson made that statement and I think I made the statement at some time during the course of our discussion that her children could be taken from her. We did not say if she cooperated they wouldn't be taken. I don't know whether Kobar said that to her or not. I don't recall if Kobar said that to her or not.

. . . . .

"I asked her who the clothing belonged to. She said they were her children's. I asked how many she had and she said 2. I asked her where they were or who took care of them. She said the children were over at the mother's or mother-in-law. I asked her how did she take care of herself and she said she was on ADC. I told her that if we took her into the station and charged her with the offense, that the ADC would probably be cut off and also that she would probably lose custody of her children. That was not before I said if she cooperated, it would go light on her. It was during the same conversation.

. . . . .

". . . I made the statement to her more than once; but I don't know how many times, that she had been set up and if she cooperated we would go light with her."

Officer Bryson testified:

> "Miss Lynumn said she was thinking about her children and she didn't want to go to jail. I was present and heard something pertaining to her being promised leniency if she would cooperate. I don't know exactly who said it. I could have, myself, or Sims."

It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.

We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. *Chambers* v. *Florida,* 309 U. S. 227; *Watts* v. *Indiana,* 338 U. S. 49, 52, 53; *Leyra* v. *Denno,* 347 U. S. 556, 558. If so, the confession cannot be deemed "the product of a rational intellect and a free will." *Blackburn* v. *Alabama,* 361 U. S. 199, 208. See also *Spano* v. *New York,* 360 U. S. 315; *Ashcraft* v. *Tennessee,* 322 U. S. 143; and see particularly, *Harris* v. *South Carolina,* 338 U. S. 68, 70.

In this case counsel for the State of Illinois has conceded, at least for purposes of argument, that the totality of the circumstances disclosed by the record must be deemed to have combined to produce an impellingly coer-

cive effect upon the petitioner at the time she told the officers she had sold marijuana to Zeno. But counsel for the State argues that we should nonetheless affirm the judgment before us upon either of two alternative grounds. It is contended first that the petitioner did not properly assert or preserve her federal constitutional claim in accord with established rules of Illinois procedure, and that her conviction therefore rests upon an adequate and independent foundation of state law. Secondly, it is urged that the petitioner's conviction "does not rest in whole or in any part upon petitioner's confession." We find both of these contentions without validity.

It is true that the record in this case does not show that the petitioner explicitly asserted her federal constitutional claim in the trial court. And it is said that in Illinois the procedural rule is settled that where a constitutional claim which is based not upon the alleged unconstitutionality of a statute, but upon the facts of a particular case, is not clearly and appropriately raised in the trial court, the claim will not be considered on appeal by the Supreme Court of Illinois. In other words, such a claim of constitutional right, it is said, must be asserted in the trial court or it will be deemed upon appellate review to have been waived. *People* v. *Touhy,* 397 Ill. 19, 72 N. E. 2d 827.

If all we had to go on were the record in the Illinois trial and appellate courts, there would indeed be color to the claim of counsel for the State, and we would be squarely faced with the necessity of determining what the Illinois procedural rule actually is, and whether the rule constituted an adequate independent ground in support of the judgment affirming the petitioner's conviction. But that is not necessary in this case. For there is here a short and complete answer to the respondent's argument. Before acting upon the petition for certiorari, we entered an order directed to this very problem. The order

accorded counsel for the petitioner "opportunity to secure a certificate from the Supreme Court of Illinois as to whether the judgment herein was intended to rest on an adequate and independent state ground, or whether decision of the federal claim . . . was necessary to the judgment rendered." 368 U. S. 908. The answer of the Supreme Court of Illinois was unambiguous. On June 8, 1962, that court issued the following "Response to Request for Certificate":

> "In response to a request by counsel for the plaintiff in error we hereby certify that decision of the federal claim referred to in the order of the United States Supreme Court dated November 13, 1961, was necessary to our judgment in this case."

We decline to search behind this certificate of the Supreme Court of Illinois.

The State's contention that the petitioner's conviction did not rest in any part upon her confession is quite without merit. The case was tried by the court without a jury. The record shows that twice during the trial the petitioner's counsel moved to strike the testimony of the police officers as to the petitioner's oral statement to them. On the first occasion the trial judge reserved a ruling on the motion "until the close of the State's case." When the motion was renewed, the record states that "[t]he motion to strike was denied." Thus the record affirmatively shows that the evidence of the petitioner's confession was admitted and considered by the trial court.

On appeal, the Supreme Court of Illinois, which has power independently to assess the evidence of guilt in a criminal case, *People* v. *Ware,* 23 Ill. 2d 59, 177 N. E. 2d 362, included in its summary of the prosecution's evidence in this case the statement that "[t]he police officers also testified to certain admissions of guilt made to them by

defendant on January 17, 1959." 21 Ill. 2d, at 67, 171 N. E. 2d, at 19. Later in its opinion, the court stated:

> "A review of the record does indicate, however, that strong suggestions of leniency were made to defendant subsequent to her arrest and prior to her admissions. Even in the absence of defendant's statements, there is clear proof by Zeno and the police officers that defendant gave Zeno a package containing marijuana. Upon a review of the entire record, we are convinced that the evidence fully supports the judgment of the trial court. . . ." 21 Ill. 2d, at 68, 171 N. E. 2d, at 20.

While this statement is not free from ambiguity, we take it to express the view that even if the testimony as to the petitioner's confession was erroneously admitted, the error was a harmless one in the light of other evidence of the petitioner's guilt.[4] That is an impermissible doctrine. As was said in *Payne* v. *Arkansas,* "this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." 356 U. S. 560, at 568.

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[4] It is difficult, however, to perceive how the admission of evidence of the confession could be considered harmless. The only other evidence of substance against the petitioner was that given by Zeno, a twice convicted felon who testified that he was eager in his own self-interest to cooperate with the police by "setting up" someone. While it was undisputed that Zeno was in possession of the package of marijuana when he emerged from the petitioner's apartment, it was far from clear that Zeno obtained the marijuana from the petitioner. Zeno was out of the police officers' sight for a period of from five to 20 minutes, and there were other apartments in the building where Zeno might have obtained the package.

See *Spano* v. *New York,* 360 U. S. 315, 324; *Watts* v. *Indiana,* 338 U. S. 49, 50, n. 2; *Haley* v. *Ohio,* 332 U. S. 596, 599.

The judgment is set aside, and the case is remanded to the Supreme Court of Illinois for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Syllabus.

# GIBSON *v.* FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 6. Argued December 5, 1961.—Restored to the calendar for reargument April 2, 1962.—Reargued October 10–11, 1962.—Decided March 25, 1963.

In a Florida State Court, petitioner, who was president of the Miami Branch of the National Association for the Advancement of Colored People, was adjudged in contempt and sentenced to fine and imprisonment for refusing to divulge contents of the membership records of that Branch to a committee created by the Florida Legislature, which was investigating the infiltration of Communists into various organizations. There was no suggestion that the Association or its Miami Branch was a subversive organization or that either was Communist dominated or influenced. The purpose of the questions asked petitioner was to ascertain whether 14 persons previously identified as Communists or members of Communist front or affiliated organizations were members of the Miami Branch of the Association. The principal evidence relied upon to show any relationship between the Association and subversive or Communist activities was indirect, ambiguous, and mostly hearsay testimony by two witnesses that, in years past, those 14 persons had attended occasional meetings of the Miami Branch of the Association "and/or" were members of that Branch, which had about 1,000 members. *Held:* On the record in this case, petitioner's conviction of contempt for refusal to divulge information contained in the membership lists of the Association violated rights of association protected by the First and Fourteenth Amendments. Pp. 540–558.

1. When, as in this case, the claim is made that a legislative investigation intrudes upon First and Fourteenth Amendment associational rights of individuals, the State must show convincingly a substantial relation between the information sought and a subject of overriding and compelling state interest. Pp. 543–546.

2. *Barenblatt* v. *United States*, 360 U. S. 109; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431; and *Uphaus* v. *Wyman*, 360 U. S. 72, distinguished. Pp. 547–550.

3. An adequate foundation for inquiry must be laid before a legislative investigation proceeds in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected associational rights, and the record in this case is not sufficient to show a substantial connection between the Miami Branch of the Association and Communist *activities*, or to demonstrate a compelling and subordinating state interest necessary to sustain the State's right to inquire into the membership lists of the Association. Pp. 550–557.

4. Groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities must be protected in their rights of free and private association guaranteed by the First and Fourteenth Amendments. Pp. 557–558.

126 So. 2d 129, reversed.

*Robert L. Carter* reargued the cause for petitioner. With him on the brief was *Frank D. Reeves.*

*Mark R. Hawes* reargued the cause for respondent. With him on the brief was *Erle B. Askew.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case is the culmination of protracted litigation involving legislative investigating committees of the State of Florida and the Miami branch of the National Association for the Advancement of Colored People.

The origins of the controversy date from 1956, when a committee of the Florida Legislature commenced an investigation of the N. A. A. C. P. Upon expiration of this committee's authority, a new committee was established to pursue the inquiry. The new committee, created in 1957, held hearings and sought by subpoena to obtain the entire membership list of the Miami branch of the N. A. A. C. P.; production was refused and the committee obtained a court order requiring that the list be submitted. On appeal, the Florida Supreme Court held that

the committee could not require production and disclosure of the entire membership list of the organization, but that it could compel the custodian of the records to bring them to the hearings and to refer to them to determine whether specific individuals, otherwise identified as, or "suspected of being," Communists, were N. A. A. C. P. members. 108 So. 2d 729, cert. denied, 360 U. S. 919.

Because of the impending expiration of the authority of the 1957 committee, the Florida Legislature in 1959 established the respondent Legislative Investigation Committee to resume the investigation of the N. A. A. C. P. The authorizing statute, c. 59–207, Fla. Laws 1959, defining the purpose and operations of the respondent, declared:

> "It shall be the duty of the committee to make as complete an investigation as time permits of all organizations whose principles or activities include a course of conduct on the part of any person or group which would constitute violence, or a violation of the laws of the state, or would be inimical to the well-being and orderly pursuit of their personal and business activities by the majority of the citizens of this state. . . ." [1]

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[1] The prefatory portions of the statute noted the existence of the predecessor committees, recited that the 1957 committee had "been prevented" from conducting its investigations by "the deliberate and almost unanimous action of the witnesses before it in resorting to litigation to frustrate said committee's investigations" and asserted that as a result the committee was "mired down" in numerous lawsuits; the committees' records and reports were said to disclose "a great abuse of the judicial processes," as well as violent or illegal conduct, or the threat thereof, and Communist attempts to "agitate and engender ill-will between the races." The enactment concluded that "there still exists the same grave and pressing need for such a committee to exist . . . to continue and complete the above two committees' work, and to participate in and contest the efforts represented by the

The petitioner, then president of the Miami branch of the N. A. A. C. P., was ordered to appear before the respondent Committee on November 4, 1959, and, in accordance with the prior decision of the Florida Supreme Court, to bring with him records of the association which were in his possession or custody and which pertained to the identity of members of, and contributors to, the Miami and state N. A. A. C. P. organizations. Prior to interrogation of any witnesses the Committee chairman read the text of the statute creating the Committee and declared that the hearings would be "concerned with the activities of various organizations which have been or are presently operating in this State in the fields of, first, race relations; second, the coercive reform of social and educational practices and mores by litigation and pressured administrative action; third, of labor; fourth, of education; fifth, and other vital phases of life in this State." The chairman also stated that the inquiry would be directed to Communists and Communist activities, including infiltration of Communists into organizations operating in the described fields.

Upon being called to the stand, the petitioner admitted that he was custodian of his organization's membership records and testified that the local group had about 1,000 members, that individual membership was renewed annually, and that the only membership lists maintained were those for the then current year.

The petitioner told the Committee that he had not brought these records with him to the hearing and announced that he would not produce them for the purpose of answering questions concerning membership in

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above referred to litigation to whittle away further at this State's rights and sovereignty, and to be ever ready to investigate any agitator who may appear in Florida in the interim [between legislative sessions]."

the N. A. A. C. P. He did, however, volunteer to answer such questions on the basis of his own personal knowledge; when given the names and shown photographs of 14 persons previously identified as Communists or members of Communist front or affiliated organizations, the petitioner said that he could associate none of them with the N. A. A. C. P.

The petitioner's refusal to produce his organization's membership lists was based on the ground that to bring the lists to the hearing and to utilize them as the basis of his testimony would interfere with the free exercise of Fourteenth Amendment associational rights of members and prospective members of the N. A. A. C. P.

In accordance with Florida procedure, the petitioner was brought before a state court and, after a hearing, was adjudged in contempt, and sentenced to six months' imprisonment and fined $1,200, or, in default in payment thereof, sentenced to an additional six months' imprisonment. The Florida Supreme Court sustained the judgment below, 126 So. 2d 129, and this Court granted certiorari, 366 U. S. 917; the case was argued last Term and restored to the calendar for reargument this Term, 369 U. S. 834.

I.

We are here called upon once again to resolve a conflict between individual rights of free speech and association and governmental interest in conducting legislative investigations. Prior decisions illumine the contending principles.

This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments. *NAACP* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Shelton* v. *Tucker,* 364 U. S. 479; *NAACP* v. *Button,* 371 U. S. 415. The respondent Committee

does not contend otherwise, nor could it, for, as was said in *NAACP* v. *Alabama, supra,* "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U. S., at 460. And it is equally clear that the guarantee encompasses protection of privacy of association in organizations such as that of which the petitioner is president; indeed, in both the *Bates* and *Alabama* cases, *supra,* this Court held N. A. A. C. P. membership lists of the very type here in question to be beyond the States' power of discovery in the circumstances there presented.

The First and Fourteenth Amendment rights of free speech and free association are fundamental and highly prized, and "need breathing space to survive." *NAACP* v. *Button,* 371 U. S. 415, 433. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock, supra,* 361 U. S., at 523. And, as declared in *NAACP* v. *Alabama, supra,* 357 U. S., at 462, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." So it is here.

At the same time, however, this Court's prior holdings demonstrate that there can be no question that the State has power adequately to inform itself—through legislative investigation, if it so desires—in order to act and protect its legitimate and vital interests. As this

Court said in considering the propriety of the congressional inquiry challenged in *Watkins* v. *United States,* 354 U. S. 178: "The power . . . to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." 354 U. S., at 187. And, more recently, it was declared that "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U. S. 109, 111. It is no less obvious, however, that the legislative power to investigate, broad as it may be, is not without limit. The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information. Validation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands. See, *e. g., Watkins* v. *United States, supra,* 354 U. S., at 197–199. See also *Barenblatt* v. *United States, supra,* 360 U. S., at 127–130. When, as in this case, the claim is made that particular legislative inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals, the courts are called upon to, and must, determine the permissibility of the challenged actions, *Watkins* v. *United States, supra,* 354 U. S., at 198–199; "[T]he delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights," *Schneider* v. *State,* 308 U. S. 147, 161. The interests here at stake are

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of significant magnitude, and neither their resolution nor impact is limited to, or dependent upon, the particular parties here involved. Freedom and viable government are both, for this purpose, indivisible concepts; whatever affects the rights of the parties here, affects all.

II.

Significantly, the parties are in substantial agreement as to the proper test to be applied to reconcile the competing claims of government and individual and to determine the propriety of the Committee's demands. As declared by the respondent Committee in its brief to this Court, "Basically, this case hinges entirely on the question of whether the evidence before the Committee [was] . . . sufficient to show probable cause or nexus between the N. A. A. C. P. Miami Branch, and Communist activities." We understand this to mean—regardless of the label applied, be it "nexus," "foundation," or whatever—that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. Absent such a relation between the N. A. A. C. P. and conduct in which the State may have a compelling regulatory concern, the Committee has not "demonstrated so cogent an interest in obtaining and making public" the membership information sought to be obtained as to "justify the substantial abridgment of associational freedom which such disclosures will effect." *Bates* v. *Little Rock, supra,* 361 U. S., at 524. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Ibid.*

Applying these principles to the facts of this case, the respondent Committee contends that the prior decisions of this Court in *Uphaus* v. *Wyman,* 360 U. S. 72; *Barenblatt* v. *United States,* 360 U. S. 109; *Wilkinson* v. *United States,* 365 U. S. 399; and *Braden* v. *United States,* 365 U. S. 431, compel a result here upholding the legislative right of inquiry. In *Barenblatt, Wilkinson,* and *Braden,* however, it was a refusal to answer a question or questions concerning the witness' *own* past or present membership *in the Communist Party* which supported his conviction. It is apparent that the necessary preponderating governmental interest and, in fact, the very result in those cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is *itself* a permissible subject of regulation and legislative scrutiny.[2] Assuming the correctness of the premises on which those cases were decided, no further demonstration of compelling governmental interest was deemed necessary, since the direct object of the challenged questions there was discovery of membership in the Communist Party, a matter held pertinent to a proper subject then under inquiry.

Here, however, it is not alleged Communists who are the witnesses before the Committee and it is not discovery of their membership in that party which is the object of the challenged inquiries. Rather, it is the N. A. A. C. P. itself which is the subject of the investigation, and it is its local president, the petitioner, who was called before

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[2] See, *e. g., Barenblatt* v. *United States,* 360 U. S. 109, 127–128. Thus, this Court "has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character." *Id.,* at 128. See also *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 88–105.

the Committee and held in contempt because he refused to divulge the contents of its membership records. There is no suggestion that the Miami branch of the N.A.A.C.P. or the national organization with which it is affiliated was, or is, itself a subversive organization. Nor is there any indication that the activities or policies of the N. A. A. C. P. were either Communist dominated or influenced. In fact, this very record indicates that the association was and is against communism and has voluntarily taken steps to keep Communists from being members. Each year since 1950, the N. A. A. C. P. has adopted resolutions barring Communists from membership in the organization. Moreover, the petitioner testified that all prospective officers of the local organization are thoroughly investigated for Communist or subversive connections and, though subversive activities constitute grounds for termination of association membership, no such expulsions from the branch occurred during the five years preceding the investigation.

Thus, unlike the situation in *Barenblatt, Wilkinson* and *Braden, supra,* the Committee was not here seeking from the petitioner or the records of which he was custodian any information as to whether he, himself, or even other persons were members of the Communist Party, Communist front or affiliated organizations, or other allegedly subversive groups; instead, the entire thrust of the demands on the petitioner was that he disclose whether other persons were members of the N. A. A. C. P., itself a concededly legitimate and nonsubversive organization.[3]

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[3] The Florida Supreme Court, in a companion case, *Graham* v. *Florida Legislative Investigation Committee,* 126 So. 2d 133, 136, characterized the N. A. A. C. P. as "an organization perfectly legitimate but allegedly unpopular in the community." Interestingly, in *Graham,* which arose out of the very same hearings held on the same days as here involved, the Florida court, apparently on the same record we now have before us, upheld the Fourteenth Amendment

Compelling such an organization, engaged in the exercise of First and Fourteenth Amendment rights, to disclose its membership presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership. Moreover, even to say, as in *Barenblatt, supra,* 360 U. S., at 129, that it is permissible to inquire into the subject of Communist infiltration of educational or other organizations does not mean that it is permissible to demand or require from such other groups disclosure of their membership by inquiry into their records when such disclosure will seriously inhibit or impair the exercise of constitutional rights and has not itself been demonstrated to bear a crucial relation to a proper governmental interest or to be essential to fulfillment of a proper governmental purpose. The prior holdings that governmental interest in controlling subversion and the particular character of the Communist Party and its objectives outweigh the right of individual Communists to conceal party membership or affiliations by no means require the wholly different conclusion that other groups—concededly legitimate—automatically forfeit their rights to privacy of association simply because the general subject matter of the legislative inquiry is Communist subversion or infiltration. The fact that governmental interest was deemed compelling in *Barenblatt, Wilkinson,* and *Braden* and held to support the inquiries there made into membership in the Communist Party does not resolve the issues here, where the challenged questions go to membership in an admittedly lawful organization.

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claims of a witness, not himself asserted to have subversive connections, who refused to answer questions going to his own membership in the N. A. A. C. P. The court there took notice of the "considerable" evidence of possible or probable reprisals and deterrent effect on the N. A. A. C. P. resulting from involuntary disclosure of affiliation with the organization. *Id.,* at 134–135.

Respondent's reliance on *Uphaus* v. *Wyman, supra,* as controlling is similarly misplaced. There, this Court upheld the right of the State of New Hampshire, in connection with an investigation of whether "subversive" persons were within the State, to obtain a list of guests who attended a World Fellowship summer camp located in the State. In *Uphaus* this Court found that there was demonstrated a sufficient connection between subversive activity—held there to be a proper subject of governmental concern—and the World Fellowship, itself, to justify discovery of the guest list; no semblance of such a nexus between the N. A. A. C. P. and subversive *activities* has been shown here. See III, *infra.* Moreover, contrary to the facts in this case, the claim to associational privacy in *Uphaus* was held to be "tenuous at best," 360 U. S., at 80, since the disputed list was already a matter of public record by virtue of a generally applicable New Hampshire law requiring that places of accommodation, including the camp in question, maintain a guest register open to public authorities. Thus, this Court noted that the registration statute "made public at the inception the association they [the guests] now wish to keep private." 360 U. S., at 81. Finally, in *Uphaus,* the State was investigating whether subversive persons were within its boundaries and whether their presence constituted a threat to the State. No such purpose or need is evident here. The Florida Committee is not seeking to identify subversives by questioning the petitioner; apparently it is satisfied that it already knows who they are.

## III.

In the absence of directly determinative authority, we turn, then, to consideration of the facts now before us. Obviously, if the respondent were still seeking discovery of the entire membership list, we could readily dispose of this case on the authority of *Bates* v. *Little Rock,*

and *NAACP* v. *Alabama, supra;* a like result would follow if it were merely attempting to do piecemeal what could not be done in a single step. Though there are indications that the respondent Committee intended to inquire broadly into the N. A. A. C. P. membership records,[4] there is no need to base our decision today upon a prediction as to the course which the Committee might have pursued if initially unopposed by the petitioner. Instead, we rest our result on the fact that the record in this case is insufficient to show a substantial connection between the Miami branch of the N. A. A. C. P. and Communist *activities* which the respondent Committee itself concedes is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry into the membership lists of the association.

Basically, the evidence relied upon by the respondent to demonstrate the necessary foundation consists of the testimony of R. J. Strickland, an investigator for the Committee and its predecessors, and Arlington Sands, a former association official.

Strickland identified by name some 14 persons whom he said either were or had been Communists or members of Communist "front" or "affiliated" organizations. His description of their connection with the association was simply that "each of them has been a member of and/or participated in the meetings and other affairs of the N. A. A. C. P. in Dade County, Florida." In addition, one of the group was identified as having made, at an

[4] Interrogation was not to be confined simply to ascertaining whether or not the 14 persons, first named by Strickland, the Committee investigator, were members of the N. A. A. C. P. Strickland had named 38 other persons about whom inquiry was to be made, and, even more significantly, the Committee counsel declared that he had "a lot of other people" he wanted to ask about.

unspecified time, a contribution of unspecified amount to the local organization.[5]

We do not know from this ambiguous testimony how many of the 14 were supposed to have been N. A. A. C. P. members. For all that appears, and there is no indicated reason to entertain a contrary belief, each or all of the named persons may have attended no more than one or two wholly public meetings of the N. A. A. C. P., and such attendance, like their membership, to the extent it existed, in the association, may have been wholly peripheral and begun and ended many years prior even to commencement of the present investigation in 1956. In addition, it is not clear whether the asserted Communist affiliations and the association with the N. A. A. C. P., however slight, coincided in time. Moreover, except for passing reference to participation in annual elections, there is no indication that membership carried with it any right to control over policy or activities, much less that any was sought. The reasoning which would find support for the challenged inquiries in Communist attendance at meetings from which no member of the public appears to have been barred is even more attenuated, since the only prerogative seemingly attaching to such attendance was the right to listen to the scheduled speaker or program. Mere presence at a public meeting or bare membership—without more—is not infiltration of the sponsoring organization.

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[5] It is apparent that no impetus to relevant legislative interest or need can be garnered from Strickland's additional identification of a group of 33 alleged Communists or five more asserted card-carrying party members since these individuals were in no way evidentially connected with the N. A. A. C. P., locally or nationally. Were it otherwise, the mere demonstration of the existence of local and extant Communists would always support a demand for membership lists of any organization which might be thought to be an object of infiltration, and the constitutional guarantees of privacy of association and assembly would become meaningless.

It also appears that a number of the 14 persons named by Strickland were no longer even residents of Florida; as to these people, it is difficult to see any basis for supposing that they would be current—much less influential—members of the Miami branch of the N. A. A. C. P., and no other pertinent reason for the inquiry as to them could be found because, as the petitioner testified, the only membership records available related to the then current year.

Strickland did refer to one informant as having been instructed to infiltrate the N. A. A. C. P. and "other organizations." But any persuasive impact this recitation might otherwise have had is neutralized by the same informant's disclosure that his response to this command was simply to attend N. A. A. C. P. meetings "on occasions" and by the absence of any other substantial indication of infiltration. This is not a case in which, after a proper foundation has been laid, a Communist is himself interrogated about his own alleged subversive activities or those of the Communist Party, all as part of an inquiry related to what this Court has held to be a legitimate legislative purpose to investigate the activities of the party or its knowing members.

The testimony of Sands, the other assertedly important witness, added not even a semblance of anything more convincing with regard to the existence of a connection between subversion and the N. A. A. C. P. Sands, whose officership in the association predated 1950 and who admitted that he was uncertain even as to his then current membership in the N. A. A. C. P., merely corroborated to some extent certain of Strickland's references to attendance at N. A. A. C. P. meetings by a few of the persons identified as Communists. However, this too must have related to some time in the unspecified past, since Sands admitted that he had not even been to an N. A. A. C. P. meeting in two years. Sands also noted that one of the

asserted Communists, a lawyer, had represented the association in a "murder case," but there is no explanation as to how this fact might indicate or support a conclusion of Communist influence.

Nor does the fact that the N. A. A. C. P. has demonstrated its antipathy to communism and an awareness of its threat by passage of annual antisubversion resolutions carry with it any permissible inference that it has, in fact, been infiltrated, influenced, or in any way dominated or used by Communists. Indeed, given the gross improbability of a Communist dominated or influenced organization denouncing communism, the more reasonable inference would seem to be to the contrary.

Finally, the Committee can find no support for its inquiry into the membership list from Strickland's suggestion that Sands had once uncertainly told him (Strickland) that one or possibly two of the group of 14 may have "made a talk" to the local N. A. A. C. P. chapter, again at some unspecified time in the past. There is no indication that the subject of the "talks" was in any way improper and, in any event, such isolated incidents cannot be made to do the work of substantial evidence of subversive influence or infiltration. The same is true of the few additional vague and somewhat unspecific references to other minor and nondirective participation in the affairs of the local group.[6]

This summary of the evidence discloses the utter failure to demonstrate the existence of any substantial relation-

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[6] For example, on retaking the stand, Strickland said that Sands had told him that one of the 14 had been a member of the N. A. A. C. P. prior to 1950 and that another had "delivered" N. A. A. C. P. "leaflets"; there was also separate testimony that another was believed to have been an N. A. A. C. P. member "at one time." These statements and scattered allusions to a few of the 14 "possibly" having been "seen" at N. A. A. C. P. public meetings obviously cannot support infringement of constitutional rights.

ship between the N. A. A. C. P. and subversive or Communist activities. In essence, there is here merely indirect, less than unequivocal, and mostly hearsay testimony that in years past some 14 people who were asserted to be, or to have been, Communists or members of Communist front or "affiliated organizations" attended occasional meetings of the Miami branch of the N. A. A. C. P. "and/or" were members of that branch, which had a total membership of about 1,000.

On the other hand, there was no claim made at the hearings, or since, that the N. A. A. C. P. or its Miami branch was engaged in any subversive activities or that its legitimate activities have been dominated or influenced by Communists. Without any indication of present subversive infiltration in, or influence on, the Miami branch of the N. A. A. C. P., and without any reasonable, demonstrated factual basis to believe that such infiltration or influence existed in the past, or was actively attempted or sought in the present—in short without any showing of a meaningful relationship between the N. A. A. C. P., Miami branch, and subversives or subversive or other illegal activities—we are asked to find the compelling and subordinating state interest which must exist if essential freedoms are to be curtailed or inhibited. This we cannot do. The respondent Committee has laid no adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for disclosure of its membership; the Committee has neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N. A. A. C. P. or the pursuit of its activities or the minimal associational ties of the 14 asserted Communists. The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon

such a slender showing as here made by the respondent.[7] While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons

[7] There is here even less of a connection with subversive activities than was shown in *Sweezy* v. *New Hampshire*, 354 U. S. 234, in which, on grounds not here relevant, THE CHIEF JUSTICE, writing for four members of the Court, deemed the inquiry improper. There the State Attorney General, as part of an investigation of subversive activities, sought to question a witness who, though he denied that he himself was a Communist, had "a record of affiliation with groups cited by the Attorney General of the United States or the House Un-American Activities Committee," 354 U. S., at 255, 261 (concurring opinion). The contested questions related, *inter alia*, to the activities of third persons in the Progressive Party and "considerable sworn testimony [had] . . . been given in [the] . . . investigation to the effect that the Progressive Party in New Hampshire [had] . . . been heavily infiltrated by members of the Communist Party and that the policies and purposes of the Progressive Party have been directly influenced by members of the Communist Party." *Id.*, at 265 (quoting from state court opinion). The concurring opinion of Mr. Justice Frankfurter, in which MR. JUSTICE HARLAN joined, declared with respect to this supporting demonstration that "the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these." *Ibid.* The concurring opinion concluded that "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party. A foundation in fact and reason would have to be established far weightier than the intimations that appear in the record to warrant such a view of the Progressive Party. This precludes the questioning that petitioner resisted in regard to that Party." *Id.*, at 266. Precisely the same reasoning applies here. While in *Sweezy* it did not clearly appear that the persons about whom inquiry was made were them-

espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial. What we recently said in *NAACP* v. *Button, supra,* with respect to the State of Virginia is, as appears from the record, equally applicable here: "We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community . . . ." 371 U. S., at 435.

Of course, a legislative investigation—as any investigation—must proceed "step by step," *Barenblatt* v. *United States, supra,* 360 U. S., at 130, but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights. No such foundation has been laid here. The respondent Committee has failed to demonstrate the compelling and subordinating governmental interest essential to support direct inquiry into the membership records of the N. A. A. C. P.

Nothing we say here impairs or denies the existence of the underlying legislative right to investigate or legislate with respect to subversive activities by Communists or anyone else; our decision today deals only with the manner in which such power may be exercised and we hold simply that groups which themselves are neither engaged

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selves asserted to have Communist associations, the interest in political and associational privacy was no stronger there than here; if anything, the fact that the legitimate organization itself—rather than a witness suspected of subversive ties—is here put to questioning through its president and that it is its own membership records which are the objects of scrutiny makes the claimed right worthy of more—not less—protection.

in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association. As declared in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 245 (opinion of THE CHIEF JUSTICE), "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . . ."

To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights; to impose a lesser standard than we here do would be inconsistent with the maintenance of those essential conditions basic to the preservation of our democracy.

The judgment below must be and is

*Reversed.*

MR. JUSTICE BLACK, concurring.

I concur in the Court's opinion and judgment reversing the judgment of the Supreme Court of Florida although, for substantially the same reasons stated by MR. JUSTICE DOUGLAS in his concurring opinion, I would prefer to reach our decision by a different approach. I agree with MR. JUSTICE DOUGLAS that the Fourteenth Amendment makes the First Amendment applicable to the States and protects the freedoms of religion, speech, press, assembly, and petition from state abridgment with the same force and to the same degree that the First Amendment protects them from federal abridgment. That, as the cases cited by MR. JUSTICE DOUGLAS show, is what this Court has previously held. I agree also that these Amendments

encompass freedom of the people to associate in an infinite number of organizations including the National Association for the Advancement of Colored People, of which petitioner here was president at the time it was under investigation by the Florida committee. In my view the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, Socialists or anti-Socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular. I have expressed these views in many other cases and I adhere to them now.* Since, as I believe, the National Association for the Advancement of Colored People and its members have a constitutional right to choose their own associates, I cannot understand by what constitutional authority Florida can compel answers to questions which abridge that right. Accordingly, I would reverse here on the ground that there has been a direct abridgment of the right of association of the National Association for the Advancement of Colored People and its members. But, since the Court assumes for purposes of this case that there was no direct abridgment of First Amendment freedoms, I concur in the Court's opinion, which is based on constitutional principles laid down in *Schneider* v. *Irvington,* 308 U. S. 147, 161 (1939), and later cases of this Court following *Schneider.*

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court, because it is carefully written within the framework of our current decisions. But since the matters involved touch constitutional

*E. g., *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445 (1950); *Dennis* v. *United States,* 341 U. S. 494, 579 (1951); *Barenblatt* v. *United States,* 360 U. S. 109, 134 (1959); *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 137, 147 (1961).

rights and since I see the Constitution in somewhat different dimensions than are reflected in our decisions, it seems appropriate to set out my views.

We deal here with the authority of a State to investigate people, their ideas, their activities. By virtue of the Fourteenth Amendment [1] the State is now subject to the same restrictions [2] in making the investigation as the First Amendment places on the Federal Government.

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[1] See Brennan, The Bill of Rights and the States, 36 N. Y. U. L. Rev. 761, 770–778.

[2] Some have believed that these restraints as applied to the States through the Due Process Clause of the Fourteenth Amendment are less restrictive on them than they are on the Federal Government. That is the view of my Brother HARLAN. See *Roth* v. *United States*, 354 U. S. 476, 501, 506; *Smith* v. *California*, 361 U. S. 147, 169. Mr. Justice Jackson expressed the same view in *Beauharnais* v. *Illinois*, 343 U. S. 250, 288. And compare the opinions of Justices Holmes and Brandeis in *Gitlow* v. *New York*, 268 U. S. 652, 672, and *Whitney* v. *California*, 274 U. S. 357, 372. But that view has not prevailed. The Court has indeed applied the same First Amendment requirements to the States as to the Federal Government.

As stated by MR. JUSTICE BLACK in *Speiser* v. *Randall*, 357 U. S. 513, 530 (concurring opinion):

"[T]he First Amendment . . . of course is applicable in all its particulars to the States. See, *e. g.*, *Staub* v. *City of Baxley*, 355 U. S. 313; *Poulos* v. *New Hampshire*, 345 U. S. 395, 396–397; *Everson* v. *Board of Education*, 330 U. S. 1, 8; *Thomas* v. *Collins*, 323 U. S. 516; *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Douglas* v. *Jeannette*, 319 U. S. 157, 162; *Martin* v. *Struthers*, 319 U. S. 141; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571; *Bridges* v. *California*, 314 U. S. 252, 263; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Schneider* v. *State*, 308 U. S. 147, 160; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Gitlow* v. *New York*, 268 U. S. 652, 666."

These cases are inconsistent with the view that First Amendment rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are a watered-down version of what the First Amendment guarantees.

The need of a referee in our federal system has increased with the passage of time, not only in matters of commerce but in the field of civil rights as well. Today review of both federal and state action threatening individuals' rights is increasingly important if the Free Society envisioned by the Bill of Rights is to be our ideal. For in times of crisis, when ideologies clash, it is not easy to engender respect for the dignity of suspect minorities and for debate of unpopular issues. As the President of Yale University has stated:

> "We have become too much a nation of lookers and listeners, a nation of spectators. Amidst the easy artificiality of our life, the plethora of substitutes for learning and thinking, the innumerable devices for avoiding or delegating personal responsibility for our opinions, even for having any opinions, the fine edge of our faith has been dulled, our creative powers atrophied." A. Whitney Griswold, Baccalaureate Address, Yale University, June 8, 1958 (Overbrook Press).[3]

When the State or Federal Government is prohibited from dealing with a subject, it has no constitutional privilege to investigate it. An investigation to permit a legislature properly to perform its powers of internal management is of course allowed. See *Barry* v. *Cunningham,* 279 U. S. 597, 613. But otherwise the power to investigate is only an adjunct of the power to legislate—an auxiliary power "necessary and appropriate to that end." *McGrain* v. *Daugherty,* 273 U. S. 135, 175. Investigation to determine how constitutional laws are being administered marks one limitation. The other is an investigation to determine what constitutional laws should be passed.

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[3] See Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 727–750.

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When the constitutional limits of lawmaking are passed, investigation is out of bounds, apart from the exception noted. See *Kilbourn* v. *Thompson,* 103 U. S. 168, 194–200; *McGrain* v. *Daugherty, supra,* 171–175. That is to say, investigations by a legislative committee which "could result in no valid legislation on the subject" are beyond the pale. *Kilbourn* v. *Thompson, supra,* p. 195. For it misses the whole point of our constitutional history to assume that "government," or any branch of government, somehow has rights and powers of its own apart from those necessarily attending the proper performance of its constitutional functions.

Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment, which provides in relevant part: *"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people, peaceably to assemble, and to petition the government for a redress of grievances."* "Peaceably to assemble" as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically. Historically the right to assemble was secondary to the right to petition, the latter being the primary right.[4] But today, as the Court stated in *De Jonge* v. *Oregon,* 299 U. S. 353, 364, "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." Assembly, like speech, is indeed essential "in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." *Id.,* p. 365. "The holding of meetings for peaceable political

[4] Corwin, The Constitution and What it Means Today (1958), p. 203; Arendt, On Revolution (1963), p. 25.

action cannot be proscribed." *Ibid.* A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.[5]

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[5] Jefferson's grand design included a division "into hundreds"—a viable ward system through which the people exercised their rights of sovereignty. Letter to John Tyler, May 26, 1810:

"I have indeed two great measures at heart, without which no republic can maintain itself in strength. 1. That of general education, to enable every man to judge for himself what will secure or endanger his freedom. 2. To divide every county into hundreds, of such size that all the children of each will be within reach of a central school in it. But this division looks to many other fundamental provisions. Every hundred, besides a school, should have a justice of the peace, a constable and a captain of militia. These officers, or some others within the hundred, should be a corporation to manage all its concerns, to take care of its roads, its poor, and its police by patrols, etc. (as the selectmen of the eastern townships). Every hundred should elect one or two jurors to serve where requisite, and all other elections should be made in the hundreds separately, and the votes of all the hundreds be brought together. Our present captaincies might be declared hundreds for the present, with a power to the courts to alter them occasionally. These little republics would be the main strength of the great one. We owe to them the vigor given to our revolution in its commencement in the Eastern States, and by them the Eastern States were enabled to repeal the embargo in opposition to the Middle, Southern and Western States, and their large and lubberly division into counties which can never be assembled. General orders are given out from a centre to the foreman of every hundred, as to the sergeants of an army, and the whole nation is thrown into energetic action, in the same direction in one instance and as one man, and becomes absolutely irresistible. Could I once see this I should consider it as the dawn of the salvation of the republic, and say with old Simeon, 'nunc dimittis Domine.'" 12 Writings of Thomas Jefferson (Mem. ed. 1904) 393–394.

And see letter to John Cartwright, June 5, 1824, 16 Jefferson, *op cit., supra,* 42, 44–46; letter to Samuel Kercheval, July 12, 1816, 15 Jefferson, *op. cit., supra,* 32–44; and letter to Samuel Kercheval, September 5, 1816. *Id.,* at 70–71.

Joining groups seems to be a passion with Americans. Schlesinger, The Rise of the City (1933), reviews the zeal with which Americans in the last century became the world's greatest "joiners":

> "Now Americans turned with furious zeal to the creation of secret societies cut to their own pattern. In the large cities some form of organized social commingling seemed called for to replace the spontaneous friendliness of small rural towns. Liberty and equality this generation was willing to take for granted, but fraternity filled a compelling human need. Moreover, the romantic opportunity to posture before a mystic brotherhood in all the glory of robe, plume and sword restored a sense of self-importance bruised by the anonymity of life amidst great crowds. If further inducement were needed, it was supplied by the provision made by most lodges for sickness and death benefits for their members.
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> . . . . .
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> "As was to be expected, membership was greatest in the urbanized sections of the country notwithstanding the energy with which the Negroes of the South aped their white brethren and the increasing interest of Western farmers in lodge activities. By the end of the period there were over six million names on the rosters of fraternal bodies. America possessed more secret societies and a larger number of 'joiners' than all other nations." *Id.*, pp. 288–290.

"It is not surprising, therefore, to find that at least five thousand national associations exist in the United States." Robison, Protection of Associations From Compulsory Disclosure of Membership, 58 Col. L. Rev. 614, 622.

A coming together is often necessary for communication—for those who listen as well as for those who speak.

Demosthenes, it is said, went to the seashore and declaimed to the waves in order to correct a stammer. But normally a speaker implies an audience. Joining a group is often as vital to freedom of expression as utterance itself. Registering as a student in a school or joining a faculty is as vital to freedom of expression as joining a church is to the free exercise of religion. Joining a political party may be as critical to expression of one's views as hiring reporters is to the establishment of a free press. Some have thought that political and academic affiliations have a preferred position under the due process version of the First Amendment. See *Sweezy* v. *New Hampshire,* 354 U. S. 234, 261–267 (concurring opinion). But the associational rights protected by the First Amendment are in my view much broader and cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion.

In my view, government is not only powerless to legislate with respect to membership in a lawful organization; it is also precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, regardless of the legislative purpose sought to be served. "[T]he provisions of the First Amendment . . . of course reach and limit . . . investigations." *Barenblatt* v. *United States,* 360 U. S. 109, 126. If that is not true, I see no barrier to investigation of newspapers, churches, political parties, clubs, societies, unions, and any other association for their political, economic, social, philosophical, or religious views. If, in its quest to determine whether existing laws are being enforced or new laws are needed, an investigating committee can ascertain whether known Communists or criminals are members of an organization not shown to be engaged in conduct properly subject to regulation, it is but a short and inexorable step to the conclusion that

it may also probe to ascertain what effect they have had on the other members. For how much more "necessary and appropriate" this information is to the legislative purpose being pursued!

It is no answer to the conclusion that all such investigations are illegal to suggest that the committee is pursuing a lawful objective in the manner it has determined most appropriate. For, as Laurent Frantz, The First Amendment in the Balance, 71 Yale L. J. 1424, 1441, has so persuasively shown, "it does not follow that any objective can ever be weighed against an express limitation on the means available for its pursuit. The public interest in the suppression of crime, for example, cannot be weighed against a constitutional provision that accused persons may not be denied the right to counsel." When otherwise valid legislation is sought to be applied in an unconstitutional manner we do not sustain its application. See, *e. g., Yick Wo* v. *Hopkins,* 118 U. S. 356. A different test should not obtain for legislative investigations. "[A]ny constitutional limitation serves a significant function only insofar as it stands in the way of something which government thinks ought to be done. Nothing else needs to be prohibited." [6] Frantz, *supra,* at 1445.

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[6] "But the advocate of 'judicial restraint' will insist that where there is room for a reasonable difference of opinion between . . . [the legislative body] and the Court as to whether certain action violates the first amendment, . . . [the legislature's] view should take precedence. There are excellent reasons why it should not. First of all, 'Congress shall make no law . . .' is an obvious and express effort to restrain . . . [legislative] power. If that restraint is to be effective, then . . . [the legislature] is the least appropriate body in the world to be accorded the final word as to what it means. And, while I have no desire to re-wage the general battle for judicial review, the evidence is reasonably clear that the first amendment was proposed with the express expectation and intention that the courts would enforce it." *Id.,* at 1447–1448.

For some of us a phase of the problem emerged in *United States* v. *Rumely,* 345 U. S. 41, 57–58 (concurring opinion), where several problems were posed. Can the Government demand of a publisher the names of the purchasers of his publications? Would not the spectre of a government agent then look over the shoulder of everyone who reads? Might not the purchase of a book or pamphlet today result in a subpoena tomorrow? Would not the fear of criticism go with every person into the bookstall? If the light of publicity may reach any student, any teacher, would not free inquiry be discouraged? For are there not always books and pamphlets that are critical of the administration or that preach an unpopular policy in domestic or foreign affairs or that are in disrepute in the orthodox school of thought? If the press and its readers were subject to the harassment of hearings, investigations, reports, and subpoenas, government would indeed hold a club over speech and over the press. Recognition of these dangers prompted our decision in *Talley* v. *California,* 362 U. S. 60, holding unconstitutional an ordinance requiring handbills to disclose the name and address of the distributor or printer. Plainly a legislative committee could not have obtained the same information from the petitioner in that case merely because it was seeking to determine whether Communists were behind the distribution as part of a massive propaganda campaign.

The problem was exposed again in *Russell* v. *United States,* 369 U. S. 749, where the press was being investigated. What I said there seems germane here. Since what an editor writes or thinks is none of the Government's business—except, of course, that Congress could punish the breach of a carefully drawn security law; see *Near* v. *Minnesota,* 283 U. S. 697, 715–716—it has no

power to investigate the capacities, ideology, prejudices, or politics of those who write the news.

> "It is said that Congress has the power to determine the extent of Communist infiltration so that it can know how much tighter the 'security' laws should be made. This proves too much. It would give Congress a roving power to inquire into fields in which it could not legislate. If Congress can investigate the press to find out if Communists have infiltrated it, it could also investigate the churches for the same reason. Are the pulpits being used to promote the Communist cause? Were any of the clergy ever members of the Communist Party? How about the governing board? How about those who assist the pastor and perhaps help prepare his sermons or do the research? Who comes to the confession and discloses that he or she once was a Communist?" 369 U. S., at 777.

*Bryant* v. *Zimmerman*, 278 U. S. 63, 72, held that the Due Process Clause of the Fourteenth Amendment did not prevent a State from compelling a disclosure of the membership lists of the Ku Klux Klan. That decision was made in 1928 and it is unnecessary to decide now whether its vitality has survived such cases as *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; and *Louisiana* v. *NAACP*, 366 U. S. 293, for we distinguished that case in *NAACP* v. *Alabama*, *supra*, at 465, saying, *inter alia*, "The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence." Moreover, the incorporation of the First Amendment into the Fourteenth had only recently been adumbrated (see *Gitlow* v. *New York*, 268 U. S. 652, 666) and the full exposition of the right of association that is part of the periphery of the

First Amendment had not yet been made. Indeed *Pierce* v. *Society of Sisters,* 268 U. S. 510, which sustained the right of parents to avoid public schools and to put their children in parochial schools, rested in part on the property interest of the parochial schools. *Id.,* pp. 534–535.

The right of association has become a part of the bundle of rights protected by the First Amendment (see, *e. g., NAACP* v. *Alabama, supra*), and the need for a pervasive right of privacy against government intrusion has been recognized, though not always given the recognition it deserves.[7] Unpopular groups

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[7] See generally Beaney, The Constitutional Right to Privacy in the Supreme Court, 1962 Supreme Court Review, 212; Dykstra, The Right Most Valued by Civilized Man, 6 Utah L. Rev. 305; Robison, Protection of Associations from Compulsory Disclosure of Membership, 58 Col. L. Rev. 614; Frantz, The First Amendment in the Balance, 71 Yale L. J. 1424.

A part of the philosophical basis of this right has its roots in the common law. As Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196, stated:

"The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."

See also *Olmstead* v. *United States,* 277 U. S. 438, 471, 472–479 (dissenting opinion, Brandeis, J.); *Poe* v. *Ullman,* 367 U. S. 497, 509, 515–522 (dissenting opinion).

Whether the problem involves the right of an individual to be let alone in the sanctuary of his home or his right to associate with others for the attainment of lawful purposes, the individual's interest in being free from governmental interference is the same, and, except for the limited situation where there is "probable cause" for believing that he is involved in a crime, the government's disability is equally complete.

(*NAACP* v. *Alabama, supra*) like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. *NAACP* v. *Alabama, supra,* p. 462. But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.

> "Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone." *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467–468 (dissenting opinion).

There is no other course consistent with the Free Society envisioned by the First Amendment. For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government.[8] That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right.

As MR. JUSTICE BLACK said (dissenting) in *Barenblatt* v. *United States, supra,* 150–151:

> "The fact is that once we allow any group which has some political aims or ideas to be driven from

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[8] As to problems raised when disclosure of members of a political organization which represents a foreign government is required, see *Communist Party* v. *Control Board,* 367 U. S. 1.

> the ballot and from the battle for men's minds because some of its members are bad and some of its tenets are illegal, no group is safe. Today we deal with Communists or suspected Communists. In 1920, instead, the New York Assembly suspended duly elected legislators on the ground that, being Socialists, they were disloyal to the country's principles. In the 1830's the Masons were hunted as outlaws and subversives, and abolitionists were considered revolutionaries of the most dangerous kind in both North and South. Earlier still, at the time of the universally unlamented alien and sedition laws, Thomas Jefferson's party was attacked and its members were derisively called 'Jacobins.' Fisher Ames described the party as a 'French faction' guilty of 'subversion' and 'officered, regimented and formed to subordination.' Its members, he claimed, intended to 'take arms against the laws as soon as they dare.' History should teach us then, that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time."

If a group is engaging in acts or a course of conduct that is criminal, it can be prosecuted, and it and its members can be investigated, save as the Self-Incrimination

Clause of the Fifth Amendment sets up a barrier. In *Louisiana* v. *NAACP, supra,* a state statute requiring the N. A. A. C. P. to register and disclose its membership lists was involved. We denied enforcement of that law, saying that we are "in an area where, as *Shelton* v. *Tucker,* 364 U. S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment." 366 U. S., at 296. And we added:

> "At one extreme is criminal conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Id.,* p. 297.

The Florida court in this case said that a requirement of nondisclosure would provide an "ideological asylum for those who would destroy by violence the very foundations upon which their governmental sanctuary stands." 126 So. 2d 129, 132. But there is no showing here that the N. A. A. C. P. is engaged in any criminal activity of any kind whatsoever. The Florida Supreme Court in *Graham* v. *Florida Legislative Investigation Committee,* 126 So. 2d 133, 136, conceded that the N. A. A. C. P. is "an organization perfectly legitimate but allegedly unpopular in the community." Whether it has members who have committed crimes is immaterial. One man's privacy may not be invaded because of another's perversity. If the files of the N. A. A. C. P. can be ransacked because some Communists may have joined it, then all walls of privacy are broken down. By that reasoning the records of the confessional can be ransacked because a "subversive" or a criminal was implicated. By that reasoning an entire church can be investigated because one member was an ideological stray or had once been a Communist or be-

cause the minister's sermon paralleled the party line. By that reasoning the files of any society or club can be seized because members of a "subversive" group had infiltrated it.

In sum, the State and the Federal Governments, by force of the First Amendment, are barred from investigating any person's faith or ideology by summoning him or by summoning officers or members of his society, church, or club.

Government can intervene only when belief, thought, or expression moves into the realm of action that is inimical to society. That was Jefferson's view. In his Bill for Establishing Religious Freedom he spoke primarily of religious liberty but in terms applicable to freedom of the mind in all of its aspects. It was his view that in the Free Society men's ideas and beliefs, their speech and advocacy are no proper concern of government. Only when they become brigaded with action can government move against them. Jefferson said: [9]

> ". . . that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts

[9] The Works of Thomas Jefferson (Fed. ed. 1904), Vol. 2, pp. 440–441.

against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."

Madison too knew that tolerance for all ideas across the spectrum was the only true guarantee of freedom of the mind: [10]

"Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . ."

Once the investigator has only the conscience of government as a guide, the conscience can become "ravenous," as Cromwell, bent on destroying Thomas More, said in Bolt, A Man For All Seasons (1960), p. 120. The First Amendment mirrors many episodes where men, harried and harassed by government, sought refuge in their conscience, as these lines of Thomas More show:

"MORE: And when we stand before God, and you are sent to Paradise for doing according to your con-

[10] Federalist, No. 51.

science, and I am damned for not doing according to mine, will you come with me, for fellowship?

"CRANMER: So those of us whose names are there are damned, Sir Thomas?

"MORE: I don't know, Your Grace. I have no window to look into another man's conscience. I condemn no one.

"CRANMER: Then the matter is capable of question?

"MORE: Certainly.

"CRANMER: But that you owe obedience to your King is not capable of question. So weigh a doubt against a certainty—and sign.

"MORE: Some men think the Earth is round, others think it flat; it is a matter capable of question. But if it is flat, will the King's command make it round? And if it is round, will the King's command flatten it? No, I will not sign." *Id.*, pp. 132–133.

Where government is the Big Brother,[11] privacy gives way to surveillance. But our commitment is otherwise.

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[11] "Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals, and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere. The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, while the dark eyes looked deep into Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC. In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. The patrols did not matter, however. Only the Thought Police mattered." Orwell, Nineteen Eighty-Four (1949), 4.

By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts.[12]

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join, dissenting.

The difficulties with this decision will become apparent once the case is deflated to its true size.

The essential facts are these. For several years before petitioner was convicted of this contempt, the respondent,

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[12] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . ."

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. . . ." *Whitney* v. *California*, 274 U. S. 357, 375, 377 (concurring opinion of Mr. Justice Brandeis).

a duly authorized Committee of the Florida Legislature, had been investigating alleged Communist "infiltration" into various organizations in Dade County, Florida, including the Miami Branch of the National Association for the Advancement of Colored People.[1] There was no suggestion that the branch itself had engaged in any subversive or other illegal activity, but the Committee had developed information indicating that 14 of some 52 present or past residents of Dade County, apparently at one time or another members of the Communist Party or connected organizations,[2] were or had been members or had "participated in the meetings and other affairs" of this local branch of the N. A. A. C. P.

Having failed to obtain from prior witnesses, other than its own investigator, any significant data as to the truth or falsity of this information, the Committee, in 1959, summoned the petitioner to testify, also requiring that he bring with him the membership records of the branch. Petitioner, a Negro clergyman, was then and for the past five years had been president of the local branch, and his custodianship of the records stands conceded.

On his appearance before the Committee petitioner was asked to consult these records himself and, after doing so, to inform the Committee which, if any, of the 52 individually identified persons were or had been members of the N. A. A. C. P. Miami Branch. He declined to do this on two grounds. *First,* he said that the N. A. A. C. P. itself had already undertaken action "excluding from our ranks any and all persons who may have subversive tendencies."

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[1] We are told by counsel for the Committee, without contradiction by the petitioner, that the investigations of the predecessor committees have included the activities of such persons and organizations as John Casper, the Ku Klux Klan, and the Seaboard White Citizens Council.

[2] The Committee's information as to such membership has not been challenged in this case.

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To substantiate this, petitioner furnished the Committee with copies of "Anti-Communism" resolutions which he stated had been adopted each year since 1950 at the Association's annual convention. *Second,* petitioner protested that production of the membership records would violate "a legal right of ours, the right of association." At the same time the petitioner expressed willingness to testify from recollection as to the membership or nonmembership in the local branch of any persons that the Committee might name to him.

The petitioner was then asked to state from recollection the N. A. A. C. P. membership *vel non* of the 14 persons mentioned above, photographs of each being exhibited to him. But he was unable to supply any information, disclaiming even knowledge of most of the names. He was then again asked to utilize the membership records as a testimonial aid, it having been earlier made clear to him that the Committee itself did not propose to look at the records:

> "[By Committee counsel]. Now, are you aware of the fact, Reverend, that we're not actually asking you to turn over to this Committee those records, but that we're asking that you bring those records here for the purpose of consulting them yourself and telling us, under oath, after consulting them, whether or not certain people who we will name are members, or have been members of your organization?
> "[By the witness]. I'm aware of it."

Petitioner persisted in his refusal. This contempt charge and conviction, and its affirmance by the Supreme Court of Florida, 126 So. 2d 129, followed.

I.

This Court rests reversal on its finding that the Committee did not have sufficient justification for including

the Miami Branch of the N. A. A. C. P. within the ambit of its investigation—that, in the language of our cases (*Uphaus* v. *Wyman,* 360 U. S. 72, 79), an adequate "nexus" was lacking between the N. A. A. C. P. and the subject matter of the Committee's inquiry.

The Court's reasoning is difficult to grasp. I read its opinion as basically proceeding on the premise that the governmental interest in investigating Communist infiltration into admittedly nonsubversive organizations, as distinguished from investigating organizations themselves suspected of subversive activities, is not sufficient to overcome the countervailing right to freedom of association. *Ante,* pp. 547–549. On this basis "nexus" is seemingly found lacking because it was never claimed that the N. A. A. C. P. Miami Branch had itself engaged in subversive activity, *ante,* pp. 554–555, and because none of the Committee's evidence relating to any of the 52 alleged Communist Party members was sufficient to attribute such activity to the local branch or to show that it was dominated, influenced, or used "by Communists." *Ante,* pp. 550–555.

But, until today, I had never supposed that any of our decisions relating to state or federal power to investigate in the field of Communist subversion could possibly be taken as suggesting any difference in the degree of governmental investigatory interest as between Communist infiltration *of* organizations and Communist activity *by* organizations. See, *e. g., Barenblatt* v. *United States,* 360 U. S. 109 (infiltration into education); *Wilkinson* v. *United States,* 365 U. S. 399, and *Braden* v. *United States,* 365 U. S. 431 (infiltration into basic industries); *Russell* v. *United States,* 369 U. S. 749, 773 (infiltration of newspaper business).

Considering the number of congressional inquiries that have been conducted in the field of "Communist infiltration" since the close of World War II, affecting such

diverse interests as "labor, farmer, veteran, professional, youth, and motion picture groups" (*Barenblatt, supra,* at 119), it is indeed strange to find the strength of state interest in the same type of investigation now impugned. And it is not amiss to recall that government evidence in Smith Act prosecutions has shown that the sensitive area of race relations has long been a prime target of Communist efforts at infiltration. See *Scales* v. *United States,* 367 U. S. 203, 235, 245, 249 n. 26, 251, 255–256.

Given the unsoundness of the basic premise underlying the Court's holding as to the absence of "nexus," this decision surely falls of its own weight. For unless "nexus" requires an investigating agency to prove in advance the very things it is trying to find out, I do not understand how it can be said that the information preliminarily developed by the Committee's investigator was not sufficient to satisfy, under any reasonable test, the requirement of "nexus."

Apart from this, the issue of "nexus" is surely laid at rest by the N. A. A. C. P.'s own "Anti-Communism" resolution, first adopted in 1950, which petitioner had voluntarily furnished the Committee before the curtain came down on his examination:

> "ANTI-COMMUNISM
>
> "Whereas, certain branches of the National Association for the Advancement of Colored People are being rocked by internal conflicts between groups who follow the Communist line and those who do not, which threaten to destroy the confidence of the public in the Association and which will inevitably result in its eventual disruption; and
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> "Whereas, it is apparent from numerous attacks by Communists in their official organs 'The Daily Worker' and 'Political Affairs' upon officials of the

> Association that there is a well-organized, nationwide conspiracy by Communists either to capture or split and wreck the NAACP; therefore be it
>
> "Resolved, that this Forty-First Convention of the National Association for the Advancement of Colored People go on record as unequivocally condemning attacks by Communists and their fellow-travelers upon the Association and its officials, and in order to safeguard the good-name of the Association, promote and develop unity, eliminate internal ideological friction, increase the membership and build the necessary power effectively to wage the fight for civil rights, herewith, call upon, direct and instruct the National Board of Directors to appoint a committee to investigate and study the ideological composition and trends of the membership and leadership of the local units with a view to determining causes of the aforementioned conflicts, confusion and loss of membership; be it further
>
> "Resolved, that this Convention go on record as directing and instructing the Board of Directors to take the necessary action to eradicate such *infiltration,* and if necessary to suspend and reorganize, or lift the charter and expel any unit, which, in the judgment of the Board of Directors, upon a basis of the findings of the aforementioned investigation and study of local units comes under Communist or other political control and combination." (Emphasis added.)

It hardly meets the point at issue to suggest, as the Court does (*ante,* p. 554), that the resolution only serves to show that the Miami Branch was in fact free of any Communist influences—unless self-investigation is deemed constitutionally to block official inquiry.

II.

I also find it difficult to see how this case really presents any serious question as to interference with freedom of association. Given the willingness of the petitioner to testify from recollection as to individual memberships in the local branch of the N. A. A. C. P., the germaneness of the membership records to the subject matter of the Committee's investigation, and the limited purpose for which their use was sought—as an aid to refreshing the witness' recollection, involving their divulgence only to the petitioner himself (*supra*, pp. 577–578)—this case of course bears no resemblance whatever to *NAACP* v. *Alabama*, 357 U. S. 449, or *Bates* v. *Little Rock*, 361 U. S. 516. In both of those cases the State had sought general divulgence of local N. A. A. C. P. membership lists without any showing of a justifying state interest. In effect what we are asked to hold here is that the petitioner had a constitutional right to give only partial or inaccurate testimony, and that indeed seems to me the true effect of the Court's holding today.

I have scrutinized this record with care to ascertain whether any unfairness in the Committee's proceedings could be detected. I can find none. In the questioning and treatment of witnesses, explanations of pertinency, rulings on objections, and general conduct of the inquiry, I perceive nothing in this record which savors of other than a decorous attitude on the part of the Committee and a lawyerlike and considerate demeanor on the part of its counsel. Nor do I find in the opinion of the Florida Supreme Court the slightest indication of anything other than a conscientious application of the constitutional principles governing cases such as this.

There can be no doubt that the judging of challenges respecting legislative or executive investigations in this sensitive area demands the utmost circumspection on the

part of the courts, as indeed the Florida Supreme Court has itself recognized. See *Graham* v. *Florida Legislative Investigation Comm.*, 126 So. 2d 133, 135. But this also surely carries with it the reciprocal responsibility of respecting legitimate state and local authority in this field. With all respect, I think that in deciding this case as it has the Court has failed fully to keep in mind that responsibility.

I would affirm.

MR. JUSTICE WHITE, dissenting.

In my view, the opinion of the Court represents a serious limitation upon the Court's previous cases dealing with this subject matter and upon the right of the legislature to investigate the Communist Party and its activities. Although one of the classic and recurring activities of the Communist Party is the infiltration and subversion of other organizations, either openly or in a clandestine manner, the Court holds that even where a legislature has evidence that a legitimate organization is under assault and even though that organization is itself sounding open and public alarm, an investigating committee is nevertheless forbidden to compel the organization or its members to reveal the fact, or not, of membership in that organization of named Communists assigned to the infiltrating task.

While the Court purports to be saving such a case for later consideration, it is difficult for me to understand how under today's decision a Communist in the process of performing his assigned job could be required to divulge not only his membership in the Communist Party but his membership or activities in the target organization as well. The Court fails to articulate why the State's interest is any the more compelling or the associational rights any the less endangered when a known Communist is asked whether he belongs to a protected association than

here when the organization is asked to confirm or deny that membership. As I read the Court's opinion the exposed Communist might well, in the name of the associational freedom of the legitimate organization and of its members including himself, successfully shield his activities from legislative inquiry. Thus to me the decision today represents a marked departure from the principles of *Barenblatt* v. *United States*, 360 U. S. 109, and like cases.

On the other hand, should a legislature obtain ostensibly reliable information about the penetration of Communists into a particular organization, information which in the course of things would be placed on public record like the testimony here, there could no longer be a weighty interest on the part of that organization to refuse to verify that information or to brand it as false. This is particularly true here where an officer of the association is willing to identify persons from memory and where the organization itself has called upon its own members to root out Communists who are bent upon using the association to serve the goals of the Communist Party. Unbending resistance to answering, one way or the other, a legislative committee's limited inquiries in the face of already public information to the same effect reduces the association's interest in secrecy to sterile doctrine. I would have thought that the freedom of association which is and should be entitled to constitutional protection would be promoted, not hindered, by disclosure which permits members of an organization to know with whom they are associating and affords them the opportunity to make an intelligent choice as to whether certain of their associates who are Communists should be allowed to continue their membership. In these circumstances, I cannot join the Court in attaching great weight to the organization's interest in concealing the presence of infiltrating Communists, if such be the case.

The net effect of the Court's decision is, of course, to insulate from effective legislative inquiry and preventive legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence. I respectfully dissent.

## BUSH *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 511. Argued February 26, 1963.—Decided March 25, 1963.

At his trial in a Texas State Court for the crime of felony theft, petitioner pleaded not guilty by reason of insanity; but he was convicted and sentenced to imprisonment. The Texas Court of Criminal Appeals affirmed. Subsequently, while petitioner's claim that his conviction violated the Due Process Clause of the Fourteenth Amendment was pending in this Court, he was sent to a mental hospital, where it was found that he suffers simple schizophrenia and had been only partly, or not at all, responsible for his acts for many years. The State brought this information to the attention of this Court; and the Assistant State Attorney General stated on oral argument that, if the judgment affirming petitioner's conviction were vacated, he would favor granting petitioner a new trial. *Held:* The judgment affirming petitioner's conviction is vacated and the case is remanded for consideration in the light of subsequent developments. Pp. 586–590.

Reported below: 172 Tex. Cr. R. 54, 353 S. W. 2d 855.

*Charles Alan Wright* argued the cause for petitioner. With him on the briefs was *Billy J. Moore.*

*Bruce Allen* and *Allo B. Crow, Jr.,* Assistant Attorney General of Texas, argued the cause for respondent. With them on the briefs were *Waggoner Carr,* Attorney General, and *Sam R. Wilson* and *Linward Shivers,* Assistant Attorneys General.

PER CURIAM.

This case raises questions of due process under the Fourteenth Amendment growing out of the conviction of petitioner, an indigent, for the crime of felony theft. Upon proof of two prior theft convictions, petitioner was sentenced to life imprisonment as an habitual offender. The Texas Court of Criminal Appeals affirmed. 172 Tex.

Cr. R. 54, 353 S. W. 2d 855 (1962). We granted certiorari. 371 U. S. 859.

Petitioner, who in 1924 had been adjudged insane, entered a plea of not guilty by reason of insanity. His claims of a denial of due process are based on (1) the trial court's refusal prior to trial either to send him to a state mental institution for observation and diagnosis before requiring him to stand trial or to appoint and pay for a competent psychiatrist for that purpose; and (2) the alleged denial by the trial court of adequate time for proper examination and diagnosis by a psychologist who appeared at the trial upon request of petitioner's counsel.

Three days before argument here the State commendably filed a "Supplemental Brief for the Respondent" calling to the Court's attention the following "Diagnostic Summary," relating to the petitioner's mental condition, prepared by the Psychiatric Resident of the Houston State Psychiatric Institute at Houston:

"Wynne Treatment Center

"Diagnostic Summary

"Name: BUSH, James E. T D C No. 165754

"Location: Wynne Farm

"I, the undersigned, Doctor A. Hug, examined on this date, James E. Bush, TDC #165754, an inmate of the Wynne farm and came to the following conclusions.

"James is a 64 year old white widower. He was born and raised in a stable farm family situation, together with two brothers and four sisters. None of his immediate relatives at any time were in psychiatric care. He attended the third grade and later worked mainly as a blacksmith. He was married once and has two children. As far as we know from

his record he was since 1937 seven times in prison for various offenses with also eight escapes listed. According to the same record he was in Terrell State Hospital in 1924 for mental observation.

"On examination patient showed marked psychomotor retardation. He appears to be extremely withdrawn, autistic, isolated from reality and encapsulated in himself. He appears to have no drive or interests. In his verbal productions he is very vague. He is only poorly oriented, giving the date as somewhere in January of 1963 and showed marked difficulties in recalling his past history or attending to any tests of his present memory capacity. He seems to be of low borderline intelligence. As reason for his various crimes he gives—'I always like to help somebody.' There are definite lapses in his trend of thought so that he at times appears to be odd in his statements or difficult to understand, as he, on the other hand, sometimes has difficulties to understand the examiner.

"All of the above evidence if not otherwise stated was given by James during a forty-five minute interview.

"From James' history of a social failure and from the present evidence, mainly: marked autism and incoherent thinking, we come to the conclusion that James suffers from *simple schizophrenia.*

"It is common knowledge that people who suffer from simple schizophrenia may go through life without calling the attention of a psychiatrist, since they may be distinguished as habitual criminals, alcoholics, vagabonds, etc. They all tend to run a protracted course which practically always starts early in life. They may deteriorate, but usually they go on without much deterioration. We have no doubts about the diagnosis of James, the only question we

have is how much of the psychotic picture (memory difficulties) at the present time may be due to organic deterioration, though [*sic*], for instance, arteriosclerosis or to his autism and lack of interest. On the assumption of the above diagnosis we would have to assume that James was only partly or not at all responsible for his acts, for very many years.

"Adolf Hug, M. D.

"Psychiatric resident, Houston State Psychiatric Institute, Houston, Texas.

"Born 1926 in Zurich, Switzerland.

"Trained at University of Zurich.

"Holding Swiss State Board and Board for Psychiatry in Switzerland.

"American training: one year internship, three years psychiatric residency.

"AH: rdm"

At oral argument, when the Assistant Attorney General of Texas was asked the views of his office in the event the case should be vacated and remanded by this Court, the following colloquy took place:

The Assistant Attorney General:

". . . [I]f this case was sent back . . . to the Court of Criminal Appeals, my personal position, speaking as Assistant Attorney General of the State of Texas, would be that the man should be . . . examined in this hospital [where he is presently confined as a result of the above examination] and that evidence should be presented to the trial court."

THE CHIEF JUSTICE:

"You would grant him a new trial?"

The Assistant Attorney General:

"Yes."

We observe that, as a rule of consistent application, "this Court has declined to anticipate a question of constitutional law in advance of the necessity of deciding it." *Peters* v. *Hobby,* 349 U. S. 331, 338 (1955). See *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129, 136 (1946). At the time its decision was rendered, the Court of Criminal Appeals had available to it neither the above psychiatrist's report nor the view of the Assistant Attorney General regarding disposition of the case. Appropriate federal-state relations and proper regard for state processes require that Texas' highest criminal court be afforded the opportunity to pass upon the case with these later developments before it.

The judgment of the Texas Court of Criminal Appeals is therefore vacated, and the case is remanded for consideration in light of subsequent developments.

*Reversed and remanded.*

# MICHIGAN NATIONAL BANK *v.* ROBERTSON ET UX.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 55. Decided March 25, 1963.*

Respondents purchased house trailers in Nebraska and executed notes and lien instruments to the local dealer, who negotiated them to petitioner, a national bank located in Michigan. Subsequently, respondents sued petitioner in a Nebraska State Court, alleging violations of the Nebraska Installment Loan Act and challenging the validity of the transactions and the documents executed in connection therewith. Petitioner claimed that it could not be sued in Nebraska because of 12 U. S. C. § 94, which provides that actions against a national bank "may be had" in any state court in the county or city in which it is located. This contention was rejected by the Nebraska courts, and respondents obtained judgments for the relief requested. *Held:* Certiorari is granted; the judgments are vacated; and the causes are remanded for further proceedings. Pp. 591–594.

(a) Under *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555, 12 U. S. C. § 94 applies to this suit. P. 593.

(b) In the circumstances, this is not a local action within the meaning of *Casey* v. *Adams,* 102 U. S. 66. Pp. 593–594.

(c) This suit cannot be maintained in Nebraska unless petitioner has waived the benefit of 12 U. S. C. § 94. P. 594.

Reported below: 172 Neb. 370, 385, 109 N. W. 2d 716, 739.

*Thomas M. Davies* and *Robert A. Barlow* for petitioner in both cases.

*Robert A. Nelson* and *J. Max Harding* for respondents in No. 64.

PER CURIAM.

Respondents in these two cases purchased house trailers in Nebraska, executing and delivering notes and lien

*Together with No. 64, *Michigan National Bank* v. *Hills et ux.,* also on petition for writ of certiorari to the same Court.

instruments to the local dealer who in turn negotiated them to the petitioner, a national bank located in Michigan. Respondents have now sued petitioner, alleging violations of the Nebraska Installment Loan Act and challenging the validity of the transactions and of the documents executed in connection therewith.[1] Petitioner claimed that it could not be sued in Nebraska because of 12 U. S. C. § 94 [2] and that 12 U. S. C. § 86, the federal usury provision,[3] applied to the exclusion of the Nebraska

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[1] "Violation of sections 45–114 to 45–155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible." Neb. Rev. Stat. § 45–155; see *State ex rel. Beck* v. *Associates Discount Corp.*, 168 Neb. 298, 96 N. W. 2d 55.

[2] *Venue of suits.*

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

[3] *Usurious interest; penalty for taking; limitations.*

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

The preceding section, 12 U. S. C. § 85, provides in part:

*Rate of interest on loans, discounts, and purchases.*

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and

statutes. These contentions were rejected by the Nebraska courts and respondents obtained judgments for all of the relief requested.[4] The petitions for certiorari place before the Court only the applicability of 12 U. S. C. § 94 and we confine ourselves to that matter.

All of the reasons, save one, advanced by the Nebraska Supreme Court for not applying 12 U. S. C. § 94 in these cases we have already rejected in *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555. The additional ground relied upon in No. 55 was that "[t]he instant action was a local action, not a transitory action, [s]ee § 25–404 R. R. S. 1943; [5] § 45–154, R. R. S. 1943," 172 Neb. 385, 394, 109 N. W. 2d 716, 722, and thus within the exception to 12 U. S. C. § 94 carved out by *Casey* v. *Adams,* 102 U. S. 66. This ground is likewise untenable. The applicable Nebraska venue statute on its face allows suit in more than one county and, in the case of foreign corporations such as petitioner, Nebraska Revised Statute § 25–408 [6]

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no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

[4] Respondents sought the return of all installments heretofore paid to the bank, a declaration that the note, contract and mortgage were void and uncollectible and an order directing the bank to deliver the purchasers a certificate of title free and clear of encumbrances.

[5] 25–404. *"Local actions involving statutory liability, acts, and bonds of public officers.* Actions for the following causes must be brought in the county where the cause or some part thereof arose: (1) An action for the recovery of a fine, forfeiture, or penalty, imposed by a statute . . . ."

[6] "An action, other than one of those mentioned in sections 25–401 to 25–403, against a nonresident of this state or a foreign corporation may be brought in any county in which there may be property of, or debts owing to said defendant, or where said defendant may be found; but if such defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose."

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appears to permit suit in any county where the defendant can be found. By its very nature, this is a considerably different kind of suit from the one to determine interests in property at its situs which was involved in *Casey* v. *Adams*. Moreover, although § 94 by its terms is applicable to all actions against national banks, when it was re-enacted in the Act of February 18, 1875, c. 80, 18 Stat. 320, it was appended to the provisions dealing with usury actions against national banks. See *Mercantile Nat. Bank* v. *Langdeau, supra,* at 561 and 568. We think Congress clearly intended 12 U. S. C. § 94 to apply to suits involving usury and the related matters at issue here.

The respondents, nevertheless, would have us affirm on another ground, namely, that the documents in question here provide that all matters relating to execution, interpretation, validity and performance are to be determined by the law of the State of Nebraska and that the bank has therefore waived the benefits of § 94, as it may do. *Charlotte Nat. Bank* v. *Morgan,* 132 U. S. 141. But we should not deal with this matter in the first instance. The Nebraska courts do not appear to have addressed themselves to this particular issue and, if the question is still open there, they may or may not decide that under the applicable law, the contractual provision relied upon reaches the issue of venue in the event of suit.

The petitions for certiorari are granted, the judgments are vacated and the causes are remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in the Court's remand of these cases, as I agree that, even if the bank could under 12 U. S. C. § 94 be

sued only in the county where it is located, the bank may waive the benefits of the statute. *Charlotte Nat. Bank* v. *Morgan,* 132 U. S. 141. But I concur only in the result, since I am in total disagreement with the Court's interpretation of § 94 and would prefer to affirm the judgments below holding that the Michigan National Bank can be sued in the Nebraska courts. Each lawsuit grew out of a business transaction in which the Michigan bank financed a Nebraska resident's purchase of a house trailer from a Nebraska dealer. Now, under this Court's holding, these people in Nebraska who allege that their contracts were usurious under Nebraska law must, unless the bank be held to have waived statutory venue, go all the way to Michigan to try to vindicate their rights against the bank. This harsh result is held to be compelled by a provision of the Act of June 3, 1864, c. 106, § 30, 13 Stat. 108, now codified in 12 U. S. C. § 94. I do not know of a single Act Congress has passed in a century which clearly and explicitly denies a person in one State the privilege of filing suit in his own State against an out-of-state company where service can be obtained and where the suit arises out of a transaction within the State. And I am not willing to find such a congressional purpose in § 94. I realize that this Court did hold several weeks ago in *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555, that this statute requires a suit in a state court against a national bank to be brought in the county where the bank is located. *Langdeau* merely required that the plaintiff sue in one county of the State rather than in another. Formal logic strictly applied might call for expansion of that holding to cover the different factual situation here. But that would require a plaintiff to go to another State hundreds of miles from home to bring suit for a wrong done him in a transaction in his own State, a result which I cannot believe Congress intended.

## TAR ASPHALT TRUCKING CO., INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 762. Decided March 25, 1963.

208 F. Supp. 611, affirmed.

*John J. Corcoran, Jr.* for appellant.

*Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Elliott H. Moyer* and *Robert W. Ginnane* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

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## PETERSON *v.* ALLEN CIRCUIT COURT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 415, Misc. Decided March 25, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Edwin K. Steers,* Attorney General of Indiana, and *Donald L. Adams,* Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Lane* v. *Brown, ante,* p. 477.

# WEYERHAEUSER STEAMSHIP CO. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 65. Argued February 18, 1963.—Decided April 1, 1963.

Petitioner sued the United States under the Public Vessels Act to recover damages resulting from a collision between its ship and a government dredge. The United States filed a cross-libel, and the District Court held that the collision had occurred through the mutual fault of both vessels and that, under the settled admiralty rule, each party was entitled to recover from the other one-half of its provable damages and court costs. A government employee aboard the dredge had sustained personal injuries in the collision, for which he received compensation under the Federal Employees' Compensation Act. He sued petitioner for damages, obtained a settlement of $16,000 and repaid to the United States the amount he had received under the Compensation Act. *Held:* Section 7 (b) of the Federal Employees' Compensation Act, which provides that the liability thereunder "shall be exclusive, and in place, of all other liability of the United States" to the employee and his representatives and dependents, does not limit the admiralty rule of divided damages in mutual fault collisions, and the amount paid by petitioner to the government employee should be included in computing the amount of petitioner's recovery from the Government. Pp. 597–604.

294 F. 2d 179, reversed.

*Henry R. Rolph* argued the cause for petitioner. With him on the briefs was *Chalmers G. Graham.*

*Anthony L. Mondello* argued the cause for the United States. With him on the brief were *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In September of 1955 the United States Army Dredge *Pacific* and the petitioner's vessel *F. E. Weyerhaeuser*

were in a collision off the Oregon coast. To recover for its resultant damages the petitioner brought this action against the United States under the Public Vessels Act.[1] A cross-libel was filed, and the District Court after a hearing found that the collision had occurred through the mutual fault of both vessels. Applying the settled admiralty rule of divided damages, the court held that each party was entitled to recover from the other one-half of its provable damages and court costs. 174 F. Supp. 663, supplemented at 178 F. Supp. 496.

A United States Civil Service employee aboard the *Pacific*, Reynold E. Ostrom, had sustained personal injuries in the collision. He had received compensation for these injuries under the Federal Employees' Compensation Act,[2] and had then filed a suit against the petitioner to recover damages. That lawsuit was subsequently settled by the payment to Ostrom of $16,000 by the petitioner, and Ostrom then repaid to the United States the amount which had previously been awarded him as statutory compensation, as required by the Compensation Act.[3]

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[1] 43 Stat. 1112, 46 U. S. C. § 781 *et seq.*

[2] 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[3] "If an injury or death for which compensation is payable . . . is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States . . . ." 5 U. S. C. § 777.

The United States objected to the inclusion, as part of the petitioner's damages from the collision, of the $16,000 which the petitioner had paid to Ostrom. The Government stipulated that the amount was a reasonable settlement of Ostrom's claim, and agreed that such a payment would ordinarily be includible as a proper item of the damages to be divided pursuant to the accepted admiralty formula. The Government took the position, however, that with respect to the amount paid Ostrom the established admiralty rule has been qualified by § 7 (b) of the Federal Employees' Compensation Act, which provides that the liability of the United States under the Act for

> "injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States . . . on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute . . . ." [4]

The District Court rejected the Government's argument and entered a decree which recognized the amount paid by the petitioner to Ostrom as part of the petitioner's provable damages from the collision. The Court of Appeals reversed, remanding the case to the District Court with directions to recompute the damages after excluding the Ostrom settlement, holding that the exclusive liability provision of § 7 (b) of the Compensation Act precluded any liability of the United States on account of

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[4] 63 Stat. 861, 5 U. S. C. § 757 (b).

the petitioner's payment for Ostrom's personal injuries. 294 F. 2d 179.

We granted certiorari to consider the single question whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified, as the Court of Appeals held, by the exclusive liability provision of the federal compensation statute. 369 U. S. 810. For the reasons stated in this opinion, we hold that this provision of the compensation statute does not so limit the admiralty rule, and we accordingly reverse the judgment of the Court of Appeals.

As this Court has pointed out, the Public Vessels Act "was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner . . . ." *Canadian Aviator, Ltd.*, v. *United States*, 324 U. S. 215, 228. And there can be no question that a private shipowner in a case such as this would be liable for half of all the petitioner's provable damages, including the $16,000 paid to Ostrom. The Government argues, however, that the "plain words" of the federal compensation statute nevertheless operate to limit the Government's liability in this case.

Section 7 (b) provides that the compensation remedy shall be exclusive with respect to the Government's liability "to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States . . . ." The Government points out that the general words "anyone otherwise entitled to recover damages" literally would cover a shipowner entitled to recover divided damages after a mutual fault collision. But the general language upon which the Government relies follows explicit enumeration of specific categories: employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against

giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from "plain."

The legislative history of the Federal Employees' Compensation Act, originally passed in 1916, shows that the concern of Congress was to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States. The purpose of § 7 (b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases.[5]

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[5] The Senate Report explained the addition of § 7 (b) as follows:

"Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b).' The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

"Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act is nearly identical to § 7 (b) of the Federal Employees' Compensation Act in providing that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." [6] In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, it was held that despite this exclusive liability provision, a shipowner was entitled to reimbursement from a longshoreman's employer for damages recovered against the shipowner by the longshoreman injured by the employer's negligence. The Court's decision in *Ryan* was based

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afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause *Federal employees* to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits *by employees* against such instrumentalities based upon accidents in employments.

"This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford *employees and their dependents* a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both *the beneficiaries involved* and the Government." S. Rep. No. 836, 81st Cong., 1st Sess. 23. (Emphasis supplied.)

[6] 44 Stat. 1426, 33 U. S. C. § 905.

upon the existence of a contractual relationship between the shipowner and the employer. In a series of subsequent cases, the same result was reached, although the contractual relationship was considerably more attenuated. *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563; *Crumady* v. *The J. H. Fisser*, 358 U. S. 423; *Waterman Co.* v. *Dugan & McNamara*, 364 U. S. 421.

In the present case there was no contractual relationship between the United States and the petitioner, governing their correlative rights and duties. There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault. *The Schooner Catharine* v. *Dickinson*, 17 How. 170, 177; *The North Star*, 106 U. S. 17, 21. See *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 284. Long ago this Court held that the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision. *The Chattahoochee*, 173 U. S. 540. The statute at issue in that case was the Harter Act, which categorically provides that cargo cannot collect directly from the carrying vessel for damages as a result of faults in navigation.[7] The Court held that despite this statutory

[7] The Harter Act provides in pertinent part:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or

provision, the carrying vessel must share, according to the divided damages rule, damages sustained by the non-carrying vessel resulting from liability to the carrying vessel's cargo. See also *Aktslsk. Cuzco* v. *The Sucarseco,* 294 U. S. 394.

In this case, as in *The Chattahoochee,* we hold that the scope of the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit the liability of one of the shipowners to unrelated third parties. The judgment is

*Reversed.*

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public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U. S. C. § 192.

This provision has been substantially reenacted in § 4 (2) of the Carriage of Goods by Sea Act, which provides:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;" 46 U. S. C. § 1304 (2)(a).

# STATE TAX COMMISSION OF UTAH *v.* PACIFIC STATES CAST IRON PIPE CO.

CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 178. Argued March 20, 1963.—Decided April 1, 1963.

Respondent, a Nevada corporation, manufactured in Utah certain cast-iron pipe and related products to meet the specifications of specific out-of-state jobs. Delivery was made and title passed to the purchaser at respondent's foundry in Utah, and the purchaser hauled the material to the predetermined out-of-state destination. *Held:* Since passage of title and delivery to the purchaser took place within Utah, the Commerce Clause of the Federal Constitution did not prevent Utah from levying and collecting a sales tax on this transaction. Pp. 605–606.

13 Utah 2d 113, 369 P. 2d 123, reversed.

*F. Burton Howard,* Assistant Attorney General of Utah, argued the cause for petitioner. With him on the brief was *A. Pratt Kesler,* Attorney General.

*C. M. Gilmour* argued the cause and filed a brief for respondent.

PER CURIAM.

Respondent, a Nevada corporation qualified to do business in Utah, manufactures cast-iron pipe and related items in Provo, Utah, and sells its products throughout the Western States. Prices set by respondent are for the goods delivered at a specific job site, and interstate delivery is usually made by common carrier or in respondent's own equipment. The sales here involved occurred in a different manner. In each case the material was manufactured to meet the specifications of specific out-of-state jobs. The contract called for out-of-state shipment, and respondent set a destination price which included the going common carrier freight charges between the two points involved. But delivery was made

and title passed to the purchaser at respondent's foundry in Provo. The purchaser then transported the pipe with its own equipment to the predetermined out-of-state destination. The common carrier tariff was credited to the purchaser.

The Utah Tax Commission imposed upon respondent a sales tax deficiency covering these sales.

The Supreme Court of Utah reversed the Tax Commission, on the grounds that the certainty of interstate shipment made the imposition of the tax on these shipments unconstitutional under the Commerce Clause. 13 Utah 2d 113, 369 P. 2d 123. We reverse its judgment on the authority of *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345, which holds on facts close to those of this case that a State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State.

*Reversed.*

## HARSHMAN *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 515. Decided April 1, 1963.

Judgment vacated and case remanded to District Court with instructions to dismiss indictment.

Reported below: 307 F. 2d 590.

*Francis Heisler* for petitioner.

*Solicitor General Cox, Assistant Attorney General Miller, Ralph S. Spritzer, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

PER CURIAM.

Upon suggestion of the Solicitor General the judgment is vacated and the case is remanded to the United States District Court for the Northern District of Illinois with instructions to dismiss the indictment.

## PARKER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 516. Decided April 1, 1963.

Judgment vacated and case remanded to District Court with instructions to dismiss indictment.

Reported below: 307 F. 2d 585.

*Francis Heisler* for petitioner.

*Solicitor General Cox, Assistant Attorney General Miller, Ralph S. Spritzer, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

PER CURIAM.

Upon suggestion of the Solicitor General the judgment is vacated and the case is remanded to the United States District Court for the Northern District of Illinois with instructions to dismiss the indictment.

Syllabus.

## DUGAN ET AL. *v.* RANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 31. Argued January 7, 1963.—Decided April 15, 1963.*

Respondents, who are claimants to water rights along the San Joaquin River below the Friant Dam in California, brought suit against the United States, local officials of the United States Bureau of Reclamation, and a number of irrigation and utility districts to enjoin the storing and diversion of water at the dam, which is part of the Central Valley Reclamation Project, authorized by Congress and undertaken by the Bureau of Reclamation under the Act of August 26, 1937, 50 Stat. 844. The suit was brought originally in a State Court and was removed to a Federal District Court. *Held:*

1. The McCarran amendment, 66 Stat. 560, granting consent to join the United States as a defendant in any suit "for the adjudication of rights to the use of water of a river system or other source," is not applicable here, since all claimants to water rights along the river were not made parties, no relief was asked as between claimants, and priorities were not sought to be established as to the appropriative and prescriptive rights asserted. Therefore the United States has not consented to be made a party defendant in this suit, and it must be dismissed from the suit for want of jurisdiction. Pp. 617–619.

2. The United States was empowered to acquire the water rights of respondents by physical seizure; the officials of the Bureau of Reclamation did not act beyond the scope of their authority; their alleged interference with the claimed rights of respondents would not be a trespass but a partial taking for which the United States would be required to compensate respondents; the suit to enjoin these officials actually was a suit against the United States; and it must be dismissed as to these officials. Pp. 611, 619–623.

3. If respondents have valid water rights which have been interfered with or partially taken, their remedy is not the stoppage of this government reclamation project but a suit against the United States under the Tucker Act, 28 U. S. C. § 1346, for damages,

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*Together with No. 115, *Delano-Earlimart Irrigation District et al.* v. *Rank et al.*, on certiorari to the same Court.

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measured by the difference in the market value of respondents' land before and after the interference or taking. Pp. 611, 623–626.

4. The irrigation and utility districts which have contracts with the United States for the use of the water from the lake created by this dam must likewise be dismissed from this suit. P. 626.

293 F. 2d 340, 307 F. 2d 96, affirmed in part, reversed in part and remanded.

*Solicitor General Cox* argued the cause for petitioners in No. 31. With him on the brief were *J. William Doolittle, William H. Veeder* and *Roger P. Marquis.*

*B. Abbott Goldberg* argued the cause for petitioners in No. 115. On the brief were *Denver C. Peckinpah, Adolph Moskovitz, James K. Abercrombie, Irl Davis Brett* and *J. O. Reavis.*

*Claude L. Rowe* argued the cause for respondents in both cases. With him on the briefs was *John H. Lauten.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This injunction suit, filed in 1947 by water right claimants along the San Joaquin River below Friant Dam, California, and against local officials of the United States Bureau of Reclamation, a number of Irrigation and Utility Districts and, subsequently, against the United States as well, sought to prevent the storing and diverting of water at the dam, which is part of the Central Valley Reclamation Project. 50 Stat. 844, 850 (1937). See *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950). The defense interposed was that the suit was against the United States and, therefore, beyond the jurisdiction of the courts, it not having consented to be sued. In 1956 the District Court ordered the injunction issued unless the Government constructed a "physical solution" [1]

[1] A procedure authorized by California law whereby existing rights to the use of water are protected and excess waters are put to beneficial use.

which would afford the landowners a supply of water simulating that of the past. *Rank* v. *Krug*, 142 F. Supp. 1. The Court of Appeals reversed as to the United States, finding that it had not consented to be sued. However, as to the officials, it affirmed on the ground that the United States had neither acquired nor taken the claimed water rights and that the officials were therefore acting beyond their statutory authority. *California* v. *Rank*, 293 F. 2d 340 and 307 F. 2d 96. No. 31 is the petition of the local Reclamation Bureau officials, and No. 115 is that of the Irrigation and Utility Districts. Both cases proceed from the same Court of Appeals opinion. The importance of the question to the operation of this vast federal reclamation project led us to grant certiorari. 369 U. S. 836 and 370 U. S. 936. We have concluded that the Court of Appeals was correct in dismissing the suit against the United States; that the suit against the petitioning local officials of the Reclamation Bureau is in fact against the United States and they must be dismissed therefrom; that the United States either owned or has acquired or taken the water rights involved in the suit and that any relief to which the respondents may be entitled by reason of such taking is by suit against the United States under the Tucker Act, 28 U. S. C. § 1346. These conclusions lead to a reversal of the judgment insofar as suit was permitted against the United States through Bureau officials.

## I. Aspects of the Central Valley Reclamation Project Involved.

The Project was authorized by the Congress and undertaken by the Bureau of Reclamation of the Department of the Interior pursuant to the Act of August 26, 1937, 50 Stat. 844, 850. It is generally described in sufficient detail for our purposes in *United States* v. *Gerlach Live Stock Co., supra,* and *Ivanhoe Irrigation District* v. *McCracken,* 357 U. S. 275 (1958). See Graham, The Cen-

tral Valley Project: Resource Development of a Natural Basin, 38 Cal. L. Rev. 588, 591 (1950), for a description and citation of federal authorizations.

The grand design of the Project was to conserve and put to maximum beneficial use the waters of the Central Valley of California,[2] comprising a third of the State's territory, and the bowl of which starts in the northern part of the State and, averaging more than 100 miles in width, extends southward some 450 miles. The northern portion of the bowl is the Sacramento Valley, containing the Sacramento River, and the southern portion is the San Joaquin Valley, containing the San Joaquin River. The Sacramento River rises in the extreme north, runs southerly to the City of Sacramento and then on into San Francisco Bay and the Pacific Ocean. The San Joaquin River rises in the Sierra Nevada northeast of Fresno, runs westerly to Mendota and then northwesterly to the Sacramento-San Joaquin Delta where it joins the Sacramento River. The Sacramento River, because of heavier rainfall in its watershed, has surplus water, but its valley has little available tillable soil, while the San Joaquin is in the contrary situation. An imaginative engineering feat has transported some of the Sacramento surplus to the San Joaquin scarcity and permitted the waters of the latter river to be diverted to new areas for irrigation and other needs. This transportation of Sacramento water is accomplished by pumping water from the Sacramento-San Joaquin Delta into the Delta-Mendota Canal, a lift of some 200 feet. The water then flows by gravity through this canal along the west side of the San Joaquin Valley southerly to Mendota, some 117 miles, where it is dis-

[2] See the Feasibility Report of Secretary Ickes to President Franklin D. Roosevelt, dated November 26, 1935, and approved by the President on December 2, 1935, reprinted in 90 F. Supp. 823–827 and in 1 Engle, Central Valley Project Documents, H. R. Doc. No. 416, 84th Cong., 2d Sess. 562–567 (1956).

charged into the San Joaquin River. The waters of the San Joaquin River are impounded by a dam constructed at Friant, approximately 60 miles upstream from Mendota. Friant Dam stores the water in Millerton Lake from which it is diverted by the Madera Canal on the north to Madera County and the Friant-Kern Canal on the south to the vicinity of Bakersfield for use in those areas for irrigation and other public purposes.

The river bed at Friant is at a level approximately 240 feet higher than at Mendota, 142 F. Supp. 173, which prevents the Sacramento water from being carried further upstream and replenishing the San Joaquin in the 60-mile area between Mendota and Friant Dam, thereby furnishing Sacramento River water for the entire length of the San Joaquin below Friant Dam. This 60-mile stretch of the San Joaquin—and more particularly that between Friant Dam and Gravelly Ford, 37 miles downstream—is the approximate area involved in this litigation. It has been the subject of cooperative studies by the state, local, and federal governments for many years. Indeed the initial planning of the Project recognized, as indicated by the engineering studies included in the plan, that the water flow on the San Joaquin between Friant Dam and Mendota would be severely diminished. See 18 Op. Cal. Atty. Gen. 31, 33–34 (1951). All of the parties recognized the existence of water rights in the area and the necessity to accommodate or extinguish them. Report No. 3, Calif. Water Project Authority, Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley, 1–2 (1936). The principal alternative, as shown by the reports of the United States Reclamation Bureau to the Congress and the subsequent appropriations of the Congress, was to purchase or pay for infringement of these rights. As early as 1939 the Government entered into negotiations ultimately culminating in the purchase of

water rights or agreements for substitute diversions or periodic releases of water from Friant Dam into the San Joaquin River. Graham, The Central Valley Project: Resource Development of a Natural Basin, *supra*. As of 1952 the United States had entered into 215 contracts of this nature involving almost 12,000 acres, of which contracts some 100 require the United States to maintain a live stream of water in the river.

However, agreements could not be reached with some of the claimants along this reach of the river, and this suit resulted.

## II. History of the Litigation.

The suit was filed in 1947 and has been both costly and protracted.[3] It involves some 325,000 acres of land including a portion of the City of Fresno. See map in 142 F. Supp., at 40. Originally filed in the Superior Court of California, it sought to enjoin local officials of the United States Reclamation Bureau from storing or diverting water to the San Joaquin at Friant Dam or, in the alternative, to obtain a decree of a physical solution of water rights. The action was removed to the United States District Court for the Southern District of California. The named plaintiffs claimed to represent a class of owners of riparian as well as other types of water rights. In

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[3] The trial, which lasted more than 200 days, required 30,000 pages of record and produced hundreds of orders. Opinions below are *State* v. *Rank*, 293 F. 2d 340 (C. A. 9th Cir. 1961); *Rank* v. *(Krug) United States*, 142 F. Supp. 1 (D. C. S. D. Cal. 1956). Related cases involving intermediate orders of the District Court are *Rank* v. *Krug*, 90 F. Supp. 773 (D. C. S. D. Cal. 1950); *United States* v. *United States District Court*, 206 F. 2d 303 (C. A. 9th Cir. 1953); *California* v. *United States District Court*, 213 F. 2d 818 (C. A. 9th Cir. 1954); *Rank* v. *United States*, 16 F. R. D. 310 (D. C. S. D. Cal. 1954); *City of Fresno* v. *Edmonston*, 131 F. Supp. 421 (D. C. S. D. Cal. 1955).

addition to the local officials of the Reclamation Bureau two of the Irrigation Districts receiving diverted water from Millerton Lake were originally made defendants and later the other Irrigation and Utility District defendants were joined.

The complaint challenged the constitutional authority of the United States to operate the Project. A three-judge court was impaneled pursuant to 28 U. S. C. § 2282, and it decided this issue presented no substantial constitutional question. *Rank* v. *Krug,* 90 F. Supp. 773 (D. C. S. D. Cal. 1950). This left undecided the question of whether the Secretary of the Interior and Bureau of Reclamation officials had statutory authority to acquire the water rights involved. The issue remained dormant until the Delta-Mendota Canal was completed in 1951, 142 F. Supp., at 45, and the Government began to reduce the flow of water through Friant Dam. By consent, temporary restraining orders were entered controlling the releases covering the years 1951, 1952, and part of 1953. In June of the latter year the United States withdrew its consent with the approval of the Court of Appeals, *United States* v. *United States District Court,* 206 F. 2d 303. The District Court then ordered the United States joined as a party on the basis of the McCarran amendment, Act of July 10, 1952, 66 Stat. 560, 43 U. S. C. § 666, *infra,* n. 5. Friant Dam has, however, been operated by the United States without judicial interference since June 30, 1953.

The District Court announced its opinion in the case on February 7, 1956, 142 F. Supp. 1, and the judgment was entered the next year. It declared the water rights of all of the claimants, the members of the class they claimed to represent and the intervenors, Tranquility Irrigation District and the City of Fresno, as against the United States, the Reclamation Bureau officers and the Districts. It did not grant relief as between individual

claimants of water rights or adjudicate the priority of these rights among them. 142 F. Supp., at 36. The judgment declared that the claimants

> "have been, now are, and will be entitled to the full natural flow of the San Joaquin River past Friant at all times . . . unless and until the physical solution hereinelsewhere described is erected and constructed [by the defendants] within a reasonable time, and thereafter operated as hereinelsewhere set forth." Transcript of Record, Vol. III, p. 993.

The physical solution was a series of 10 small dams to be built at the expense of the United States along the stretch of river involved for the purpose of keeping the water at a level "equivalent" to the natural flow, 142 F. Supp., at 166, or to simulate it at a flow of 2,000 feet per second. 142 F. Supp., at 169.

In summary, the court held that the United States was a proper party under the McCarran amendment; that the claimants had vested rights to the full natural flow of the river superior to any rights of the United States or other defendants; that the operation of Friant Dam does not permit sufficient water to pass down the river to satisfy these rights; that Congress has not authorized the taking of these rights by physical seizure but only by eminent domain exercised through judicial proceedings; that as a consequence the impounding at Friant Dam constitutes an unauthorized and unlawful invasion of rights for which damages are not adequate recompense; that this requires all of the defendants, including the United States, to be enjoined from storing or diverting or otherwise impeding the full natural flow of the San Joaquin at Friant Dam unless within a reasonable time and at its own expense the United States, or the Districts, build the dams aforesaid and put them into operation; that

the United States is subject to the California county of origin and watershed of origin statutes, Calif. Water Code § 10505, and §§ 11460–11463, and must first satisfy at the same charge as made for agricultural water service the full needs of the City of Fresno and Tranquility Irrigation District before diverting San Joaquin water to other areas; and finally that the United States is also subject to Calif. Water Code §§ 106 and 106.5 as to domestic-use water priority and the power of municipalities to acquire and hold water rights.[4]

The Court of Appeals reversed as to the joinder of the United States, holding that it could not be made a party without its consent. It likewise found that the United States was authorized to acquire, either by physical seizure or otherwise, such of the rights of the claimants as it needed to operate the Project and that this power could not be restricted by state law. However, it found that no such authorized seizure had occurred because the Government had not sufficiently identified what rights it was seizing, and because of this equivocation of the federal officials, there was a trespass rather than a taking. It concluded, therefore, that the petitioner Reclamation Bureau officials had acted beyond their statutory authority and affirmed the injunctive features of the judgment. On rehearing, the injunction was modified to make it inapplicable to the petitioner Districts in No. 115 but the court refused to dismiss as to them.

## III. The United States as a Party.

We go directly to the question of joinder of the United States as a party. We agree with the Court of Appeals on this issue and therefore do not consider the contention

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[4] The last two sections of the judgment are dealt with in cause No. 51, *City of Fresno* v. *California*, decided today, *post*, p. 627.

at length. It is sufficient to say that the provision of the McCarran amendment, 66 Stat. 560, 43 U. S. C. § 666,[5] relied upon by respondents and providing that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," is not applicable here. Rather than a case involving a *general* adjudication of "all of the rights of various owners on a given stream," S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to

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[5] 43 U. S. C. § 666:

"(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream." July 10, 1952, c. 651, Title II, § 208, 66 Stat. 560.

be established as to the appropriative and prescriptive rights asserted. But because of the presence of local Reclamation Bureau officials and the nature of the relief granted against them, the failure of the action against the United States does not end the matter. We must yet deal with the holding of the Court of Appeals that the suit against these officials is not one against the United States.

### IV. Relief Granted Against Federal Officers.

The Court of Appeals correctly held that the United States was empowered to acquire the water rights of respondents by physical seizure. As early as 1937, by the Rivers and Harbors Act, 50 Stat. 844, 850, the Congress had provided that the Secretary of the Interior "may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes . . . ." Likewise, in *United States* v. *Gerlach Live Stock Co., supra,* this Court implicitly recognized that such rights were subject to seizure when we held that Gerlach and others were entitled to compensation therefor. The question was specifically settled in *Ivanhoe Irrigation District* v. *McCracken, supra,* where we said that such rights could be acquired by the payment of compensation "either through condemnation or, if already taken, through action of the owners in the courts." 357 U. S., at 291. However, the Court of Appeals, in examining the extent of the taking here, concluded that rather than an authorized taking of water rights, the action of the Reclamation Bureau officials constituted an unauthorized trespass. The court observed that the San Joaquin "will not be dried up" below Friant because the Government has contracted with other water right owners to maintain "a live stream," and as the flow of water varies from day to day the respondents do not now and never

will know what part of their claimed water rights the Government has taken or will take.

> "A casual day by day taking under these circumstances constitutes day to day trespass upon the water right. . . . The cloud cast prospectively on the water right by the assertion of a power to take creates a present injury above what has been suffered by the interference itself—a present loss in property value which cannot be compensated until it can be measured." 293 F. 2d, at 358.

The court, therefore, permitted the suit against the petitioning Reclamation Bureau officers as one in trespass, which led it to affirm, with modification, the injunctive relief granted by the District Court.

Rather than a trespass, we conclude that there was, under respondents' allegations, a partial taking of respondents' claimed rights. We believe that the Court of Appeals incorrectly applied the principle of *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682 (1949), and other cases in the field of sovereign immunity. The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land* v. *Dollar,* 330 U. S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson* v. *Domestic & Foreign Corp., supra,* at 704; *Ex parte New York,* 256 U. S. 490, 502 (1921). The decree here enjoins the federal officials from "impounding, or diverting, or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River . . . ." Transcript of Record, Vol. III, p. 1021. As the Court of Appeals found, the Project "could not operate without impairing, to some degree, the full natural flow of the river." Experience of over a decade along the stretch

of the San Joaquin involved here indicates clearly that the impairment was most substantial—almost three-fourths of the natural flow of the river. To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by the Congress but paid for through its continuing appropriations. Moreover, it would prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts, which are petitioning in No. 115. The Government would, indeed, be "stopped in its tracks . . . ." *Larson* v. *Domestic & Foreign Corp., supra,* at 704.

The physical solution has no less direct effect. The Secretary of the Interior, the President and the Congress have authorized the Project as now constructed and operated. Its plans do not include the 10 additional dams required by the physical solution to be built at government expense. The judgment, therefore, would not only "interfere with the public administration" but also "expend itself on the public treasury . . . ." *Land* v. *Dollar, supra,* at 738. Moreover, the decree would require the United States—contrary to the mandate of the Congress—to dispose of valuable irrigation water and deprive it of the full use and control of its reclamation facilities. It is therefore readily apparent that the relief granted operates against the United States.

Nor do we believe that the action of the Reclamation Bureau officials falls within either of the recognized exceptions to the above general rule as reaffirmed only last Term. *Malone* v. *Bowdoin,* 369 U. S. 643. See *Larson* v. *Domestic & Foreign Corp., supra; Santa Fe Pac. R. Co.* v. *Fall,* 259 U. S. 197, 199 (1922); *Scranton* v. *Wheeler,* 179 U. S. 141, 152–153 (1900). Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exer-

cised are constitutionally void. *Malone* v. *Bowdoin, supra,* at 647. In either of such cases the officer's action "can be made the basis of a suit for specific relief against the officer as an individual . . . ." *Ibid.* But the fact that the Court of Appeals characterized the action of the officers as a "trespass" does not at all establish that it was either unconstitutional or unauthorized. As this Court said in *Larson, supra,* at 693:

> "The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet [the] requirement [that it must also appear that the action to be restrained or directed is not action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign."

And, the Court added:

> "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Id.,* at 701–702.

Since the Government, through its officers here, had the power, under authorization of Congress, to seize the property of the respondents, as held by the Court of Appeals and recognized by several cases in this Court, and this power of seizure was constitutionally permissible, as we held in *Ivanhoe, supra,* there can be no question that this case comes under the rule of *Larson* and *Malone, supra.* The power to seize which was granted here had no limitation placed upon it by the Congress, nor did the Court of

Appeals bottom its conclusion on a finding of any limitation. Having plenary power to seize the whole of respondents' rights in carrying out the congressional mandate, the federal officers *a fortiori* had authority to seize less. It follows that if any part of respondents' claimed water rights were invaded it amounted to an interference therewith and a taking thereof—not a trespass.

We find no substance to the contention that respondents were without knowledge of the interference or partial taking. Nor can we accept the view that the absence of specificity as to the amount of water to be taken prevents the assessment of damages in this case. From the very beginning it was recognized that the operation of Friant Dam and its facilities would entail a taking of water rights below the dam. Indeed, it was obvious from the expressed purpose of the construction of the dam—to store and divert to other areas the waters of the San Joaquin—and the intention of the Government to purchase water rights along the river.[6] Pursuant to this announced intention the Government did in fact enter into numerous contracts for water rights, as we have previously noted. While it is true, as the Court of Appeals observed, that the Government did not announce that it was taking water rights to a specified number of "gallons" or, for that matter, "inches" of water, see 293 F. 2d 340, 357–358, we do not think this quantitative uncertainty precludes ascertainment of the value of the taking. On this point we conclude that the Court of Appeals was in error. We find no uncertainty in the taking.

It is likely that an element of uncertainty may have been drawn by the Court of Appeals from the Secretary of the Interior's statement in a letter that the operation of Friant Dam "is an administrative one, voluntarily assumed and voluntarily to be executed." 293 F. 2d 340,

[6] See note 2, *supra*.

356, n. 8. This alone might present a picture of a spillway being opened and closed at the whim of the Secretary. We view this statement, however, as merely notice to the court that the Secretary intended to operate the water works fairly, but solely on his own, without court interference. Neither he nor the United States was a party. Even if the statement did introduce an element of uncertainty as to what exactly the Secretary might do, injunctive relief was not proper. Despite this *caveat,* damages were clearly ascertainable (see *Collier* v. *Merced Irrigation District,* 213 Cal. 554, 571–572, 2 P. 2d 790, 797 (1931)), based partially on the Secretary's prior unequivocal statement regarding his plans as to the minimum flow of water to be released into the river below the dam.[7] Parenthetically, we note that petitioners, in their brief, at p. 12, inform us that "Friant Dam has since been operated in accordance with the Secretary's stated plan, subject to adjustments required by weather and other conditions."

Damages in this instance are to be measured by the difference in market value of the respondents' land before

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[7] On March 30, 1953, in response to a request from the district judge that the Secretary clarify his position, a letter was written by the Secretary to the Attorney General expressing his "administrative intent with respect to the operation of the Central Valley project insofar as it relates to the Friant-to-Gravelly Ford reach of the San Joaquin River." The letter specified that:

". . . the Department will release from Friant Reservoir into the bed of the river a sufficient quantity of water (1) to meet all valid legal requirements for the reasonable and beneficial use of water, both surface and underground, by reasonable methods of diversion and reasonable methods of use in that area, and (2) to provide, in addition thereto, a continuous live stream flowing at a rate of not less than five cubic feet per second at specified control points throughout the Friant-to-Gravelly Ford area, the last one to be at a point approximately one-half mile below the head of the Gravelly Ford Canal." Transcript of Record, Vol. VII, p. 388, n. 8.

and after the interference or partial taking. As the Supreme Court of California said in *Collier* v. *Merced Irrigation District, supra,* at 571–572.

> ". . . [T]he riparian right is a part and parcel of the land in a legal sense, yet it is a usufructuary and intangible right inhering therein and neither a partial nor a complete taking produces a disfigurement of the physical property. The only way to measure the injury done by an invasion of this right is to ascertain the depreciation in market value of the physical property. . . . There was a distinct conflict in the evidence as to whether the lands of appellant had a greater or a less market value after the taking by respondent, but there is no question of law arising on the evidence."

The right claimed here is to the continued flow of water in the San Joaquin and to its use as it flows along the landowner's property. A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land, such as in our recent case of *Griggs* v. *Allegheny County,* 369 U. S. 84, 89–90 (1962). See *United States* v. *Causby,* 328 U. S. 256, 261–263, 267 (1946); *Portsmouth Co.* v. *United States,* 260 U. S. 327, 329 (1922). See also 1 Wiel, Water Rights in the Western States (3d ed. 1911), § 15; 2 Nichols, Eminent Domain (3d ed. 1950), § 6.3. Therefore, when the Government acted here "with the purpose and effect of subordinating" the respondents' water rights to the Project's uses "whenever it saw fit," "with the result of depriving the owner of its profitable use [there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made." *Peabody*

v. *United States,* 231 U. S. 530, 538 (1913); *Portsmouth Co.* v. *United States, supra,* at 329.

In an appropriate proceeding there would be a determination of not only the extent of such a servitude but the value thereof based upon the difference between the value of respondents' property before and after the taking. Rather than a stoppage of the government project, this is the avenue of redress open to respondents. Since we have set aside the judgments of both the Court of Appeals and the District Court, it is appropriate that we make clear that we do not in any way pass upon or indicate any view regarding the validity of respondents' water right claims.

## V. The Irrigation and Utility Districts.

Similar disposition must be made of No. 115. There the petitioners are 14 Irrigation and Utility Districts which have contracts with the Government for the use of water from Millerton Lake. The Court of Appeals, as we have noted, dissolved the injunction previously granted against them by the District Court. No other relief having been sought against the Districts, it appears that they should have been dismissed from the action. In any event, in view of our disposition of No. 31, dismissal of these petitioners is now in order.

The judgment as to the dismissal of the United States is affirmed; it is reversed as to the failure to dismiss the Reclamation officials and the Irrigation and Utility Districts, and the cases are remanded to the Court of Appeals with directions that it vacate the judgment of the District Court and remand the case with instructions that the same be dismissed.

*It is so ordered.*

The Chief Justice took no part in the consideration or decision of these cases.

## CITY OF FRESNO *v.* CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 51. Argued January 7, 1963.—Decided April 15, 1963.

Claimants to water rights along the San Joaquin River below the Friant Dam in California brought suit against the United States, local officials of the United States Bureau of Reclamation, and a number of irrigation and utility districts to enjoin the storage and diversion of water at the dam, which is part of the Central Valley Reclamation Project, authorized by Congress and undertaken by the Bureau of Reclamation under the Act of August 26, 1937, 50 Stat. 844. The suit was brought originally in a State Court and was removed to a Federal District Court. The City of Fresno intervened as a party plaintiff and, in addition to injunctive relief, sought a declaratory judgment as to (1) its rights to underground water fed by the river, (2) its statutory priority, under California law, to the use of water for municipal or domestic purposes, (3) its prior right under the California statutes because of its location, and (4) its entitlement to project water from the United States at the same rate charged for water delivered for irrigation purposes. *Held:*

1. The suit against the United States must fail for lack of consent; the relief against the Reclamation Bureau officials must also fail as being in truth against the United States; the United States had seized, in whole or in part, the water rights asserted by the claimants; and their recourse was through a suit under the Tucker Act, 28 U. S. C. § 1346, for damages. *Dugan* v. *Rank*, *ante*, p. 609. Pp. 628–629.

2. Section 8 of the Reclamation Act of 1902 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. Pp. 629–630.

3. Fresno has no preferential rights to contract for project water, but may receive it only if, in the judgment of the Secretary of the Interior, irrigation will not be adversely affected. Pp. 630–631.

4. Under § 9 (c) of the Reclamation Project Act of 1939, authority and discretion to fix rates covering irrigation as well as municipal water service was delegated to the Secretary of the Interior; and the

officials of the Bureau of Reclamation acted entirely within the scope of their authority in operating the Project as they did and fixing the rates for water in accordance with congressional mandate, as approved by this Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275. Pp. 631–632.

293 F. 2d 340, 307 F. 2d 96, affirmed as to this petitioner.

*Claude L. Rowe* argued the cause for petitioner. With him on the briefs was *John H. Lauten.*

*Solicitor General Cox* argued the cause for the United States et al., respondents. With him on the brief were *J. William Doolittle, William H. Veeder* and *Roger P. Marquis.*

*Denver C. Peckinpah, Adolph Moskovitz, James K. Abercrombie, Irl Davis Brett* and *J. O. Reavis* filed a brief for the Delano-Earlimart Irrigation District et al., respondents.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case arises out of No. 31, *Dugan* v. *Rank*, decided today, *ante*, p. 609. As set out in our opinion in that case the original suit was instituted against certain local United States Reclamation Bureau officials and several Irrigation and Utility Districts by a number of claimants to water rights along the San Joaquin River below Friant Dam. Subsequently the United States, over its protest, was made a party and the petitioner here, the City of Fresno, intervened as a party plaintiff. Fresno sought, in addition to the injunctive relief requested by the other parties, a declaration as to (1) its water rights as an overlying owner, *i. e.*, rights to underground water fed by the river; (2) its statutory priority, under California law, to the use of water for municipal or domestic purposes, Calif. Water Code, § 1460; (3) its prior right, under the California County of Origin and Watershed Acts, because of its location, Calif. Water Code, §§ 11460, 11463; and (4) its

entitlement to project water from the United States at the same rate charged for water delivered for irrigation purposes. In the District Court Fresno prevailed on all points. In the Court of Appeals this judgment was set aside "insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam," 293 F. 2d 340, 360, because in establishing the rate at which water would be delivered the respondent officials were acting "within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. . . . The complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States." *Id.*, at 352. With regard to the claim that it enjoyed water rights superior to those of the United States, the Court of Appeals refused to decide, saying on rehearing that "If and when such rights have been established in accordance with state law, Fresno may be able effectively to protest the impounding of waters by these defendants in contravention of such rights." *Id.*, at 360.

Our opinion in *Dugan* v. *Rank, supra,* controls the decision in this case. There we decided that the suit against the United States must fail for lack of consent; that the relief against the Reclamation Bureau officials must also fail as being in truth against the United States; that the United States had seized, in whole or in part, the water rights asserted by the claimants; and that their recourse was through a Tucker Act suit. 28 U. S. C. § 1346. The same is true here.

We agree entirely with the disposition of the Court of Appeals. Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U. S. C. § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the

priority of domestic over irrigation uses. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275 (1958). Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.

We also note that the County of Origin and Watershed Acts, upon which the city relies, do not grant the preference claimed. Under these statutes the area of preference is ". . . a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom . . . ." Calif. Water Code, § 11460. The area of service from Friant Dam would include Kern and Tulare Counties as well as Fresno and Madera. (See map in 142 F. Supp., at 40.) The preference under the Acts is not limited to that area closest to the stream, but extends beyond the watershed and to areas adjacent thereto which can "conveniently be supplied with water therefrom," which from the map would seem to include the Friant-Kern as well as the Madera Canal areas. Likewise, the claim as to the preference of water devoted to domestic uses is unfounded. Section 9 (c) of the Reclamation Project Act of 1939, 53 Stat. 1194, as amended, 43 U. S. C. 485h (c), provides: "No contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary [of the Interior], it will not impair the efficiency of the project for irrigation purposes." In *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950), we were concerned with an issue regarding the nature of the Friant Dam unit of the Project and, contrary to petitioner's contention, concluded "that Congress realistically elected to treat it as a reclamation project." *Id.*, at 739. It therefore appears clear that

Fresno has no preferential rights to contract for project water, but may receive it only if, in the Secretary's judgment, irrigation will not be adversely affected.

As to the rates charged for municipal water, this same § 9 (c), *supra,* delegates authority and discretion to the Secretary of the Interior to fix rates covering irrigation as well as municipal water service. It provides that the yardstick for determining rates shall be such "as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper . . . ." The Secretary exercised this discretion and so notified the Congress as to the basis for his determination of the appropriate charge for municipal water. Allocation of Costs and Feasibility Report of February 24, 1947, H. R. Doc. No. 146, 80th Cong., 1st Sess. 19; 1 Engle, Central Valley Project Doc. (1956), H. R. Doc. No. 416, 84th Cong., 2d Sess. 574, 594–596. This report estimated a rate of $10 per acre-foot for municipal water and about $3 per acre-foot or less for irrigation water. *Id.,* at 594–596. The latter rate was based on farm benefits as well as the ability of the user to pay over a protracted period. It was estimated that this rate would return during the repayment period only about one-fourth of the project capital cost allocated to irrigation. *Id.,* at 576–577, 597. As to municipal rates, the return during the same period was estimated at over three times the project capital cost allocated to the delivery of municipal water.* This surplus, together with that from project electric energy, would be used to pay project costs allocated to irrigation but which were beyond the ability of the irrigators to pay.

*The payments for irrigation water amounted to $58,545,475, while project capital cost allocated to irrigation was $221,551,600. Municipal water rates would return $29,667,932, while project capital cost allocated to municipal water supply was $9,091,800.

Congress has been kept advised as to the manner in which these rate schedules are operating. 2 Engle, Central Valley Project Doc. (1957), H. R. Doc. No. 246, 85th Cong., 1st Sess. 79–84, 261–262.

In accordance with the Secretary's estimates, long-term contracts for Friant Dam water provide for a rate of $3.50 per acre-foot for Class 1 water and $1.50 for Class 2, while contracts for municipal water supply call for $10 per acre-foot. It appears amply clear that the Reclamation Bureau officials were acting entirely within the scope of their authority in operating the Project in this manner and fixing the rates for water in accordance with congressional mandate, all of which has specifically received our approval in *Ivanhoe Irrigation District* v. *McCracken, supra,* at 295.

The judgment, insofar as it relates to this petition of the City of Fresno, is affirmed and the case remanded to the Court of Appeals with directions to vacate the judgment of the District Court and remand the case with instructions to dismiss the same.

*It is so ordered.*

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

## WOLF ET AL. *v.* WEINSTEIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 70. Argued February 20, 1963.—Decided April 15, 1963.

In a proceeding under Chapter X of the Bankruptcy Act for the reorganization of a debtor corporation, the Court permitted the debtor to remain in possession pursuant to § 156 of the Bankruptcy Act, authorized its President and General Manager to continue to serve in those capacities and approved salaries for each of them. The General Manager actively managed the business and the President acted primarily in a consultive or advisory capacity. After hearings, the District Court concluded that each of them was a "fiduciary" within the meaning of § 249 of the Bankruptcy Act and that they had traded in stock of the debtor corporation without the consent or approval of the judge, and it ordered that their compensation be terminated, that the General Manager be discharged and that the President have nothing more to do with the management of the business. *Held:*

1. The purpose of § 249 was to give pervasive effect in Chapter X proceedings to the historic maxim of equity that a fiduciary may not receive compensation for services tainted by disloyalty or conflict of interest; and no congressional purpose to exclude insiders, such as a President or General Manager of a debtor corporation, can be perceived. Pp. 639–645.

2. On the record in this case, the District Court correctly found that the President and General Manager of this debtor corporation were fiduciaries and that § 249 applies to them. Pp. 646–653.

(a) Section 249 was not intended to apply only to those persons specifically listed in §§ 241–243 who are required to apply to the Court for compensation or reimbursement under § 247. Pp. 646–647.

(b) Approval by the Court of the compensation of an officer or an employee under § 191 does not immunize him from the sanctions of § 249. Pp. 647–649.

(c) Since officers of a debtor corporation left in possession under § 156 perform essentially the functions which otherwise would be performed by a disinterested trustee, they incur similar responsibilities and obligations to the creditors and shareholders,

which may make them fiduciaries within the meaning of § 249. Pp. 649–652.

(d) Since the District Court took evidence concerning the activities and responsibilities of the President and General Manager here involved and concluded that each of them was a "fiduciary" for the purpose of § 249, and the record supports these findings, they were properly held subject to § 249. Pp. 652–653.

3. Although respondents' trading involved small amounts of the debtor's stock and apparently was carried on in good faith, the pervasive policies of § 249 require not only the denial of all future compensation but also the restitution of all compensation received since the start of the reorganization; but they do not necessarily require the removal of respondents from their corporate offices. Pp. 653–657.

4. Certiorari was also granted in this case to review a judgment of the Court of Appeals reversing an order of the District Court determining a controversy over the rights of numerous claimants to stock interests in the debtor corporation, but oral argument revealed that the controversy primarily involved questions of state law and presented no federal question of substance. Therefore, the writ of certiorari as to the judgment of the Court of Appeals concerning that controversy is dismissed as improvidently granted. P. 636.

296 F. 2d 678, reversed and remanded.

*Melvin Lloyd Robbins* argued the cause and filed briefs for petitioners.

*Alex L. Rosen* argued the cause and filed a brief for respondent Nazareth Fairgrounds & Farmers' Market, Inc. With him on the brief was *Marvin N. Rosen*. *Harold Harper* argued the cause and filed a brief for respondent Jerome Fried. With him on the brief was *Vincent P. Uihlein*. On the briefs for other respondents were *Arnold A. Weinstein, pro se,* and *Hyman L. Rutman* for William McK. Shongut.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case concerns two orders of the District Court for the Southern District of New York made in a proceed-

ing for the reorganization of respondent corporation, Nazareth Fairgrounds and Farmers' Market, Inc. (the Debtor), under Chapter X of the Bankruptcy Act, 11 U. S. C. §§ 501–676. One order determined a controversy over the rights of numerous claimants to stock interests in the Debtor. The other order—predicated on findings that respondent Weinstein, President of the Debtor, and respondent Fried, the Debtor's General Manager, had traded in the Debtor's stock during the proceeding in violation of § 249 of the Bankruptcy Act, 11 U. S. C. § 649 [1]—directed that Weinstein have nothing further to do with the operation of the Debtor's business, that Fried be discharged as General Manager and that the compensation of both be terminated forthwith. Neither respondent was, however, directed to return the compensation he had received before the date of the order. The Court of Appeals for the Second Circuit, in separate opinions, reversed both orders. We granted certiorari, 369 U. S. 837.

We decide only the issues presented by the Court of Appeals' reversal of the District Court's order applying § 249 to Weinstein and Fried, adjudicated *sub nom. In re Nazareth Fairgrounds & Farmers' Market, Inc., Debtor,*

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[1] 11 U. S. C. § 649:

"Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." This provision was added by the Chandler Act of June 22, 1938, c. 575, 52 Stat. 901.

296 F. 2d 678. Decision of those issues, which involve the reach of § 249, is important in the administration of the Bankruptcy Act. But our consideration of the issues underlying the order of the District Court reversed *sub nom. Fried* v. *Margolis,* 296 F. 2d 670, persuades us that the grant of certiorari to review these issues was improvident. Oral argument brought into sharper focus than was apparent at the time we granted the writ that the controversy over the stock interests primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted. Cf. *The Monrosa* v. *Carbon Black, Inc.,* 359 U. S. 180, 183–184.

The pertinent provisions of § 249 disallow compensation or reimbursement to any person "acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold . . . stock [of the Debtor] . . . without the prior consent or subsequent approval of the judge . . . ." Both Weinstein and Fried traded in the Debtor's stock while serving respectively as President and General Manager.[2] Both held their positions with the approval of

[2] The petition on which the District Court's order was based alleged that in 1958 and 1959 Weinstein (who was still a director and officer of the Debtor) had purchased three shares and sold a fraction of one, and that in 1959 he or persons represented by him had exercised options to purchase six shares. It was further alleged that Fried had bought 20 shares in 1957, of which he had resold 10 shares in 1958. Although conceding that he had bought and sold securities of the Debtor, Weinstein insisted before the District Court that he was unaware of the existence of § 249, and had bought the stock only to keep the corporation out of the control of "raiders," and not for personal profit. Fried also admitted the alleged transactions, but maintained that he had been motivated neither by inside information nor by any improper motive to use his corporate position to enhance his trading.

the District Court which, after permitting the Debtor to remain in possession pursuant to § 156, 11 U. S. C. § 556, authorized Weinstein to continue to serve as President and Fried to continue as General Manager. The court also approved salaries for each.[3] Fried has actively managed the business, the principal asset of which is a farmers' market located in Eastern Pennsylvania. Weinstein, a New York attorney, has acted primarily in a consultative or advisory capacity. The Debtor's business has prospered under their management despite considerable friction and dissension between factions contending for stock and managerial control.

The District Court, after hearings upon the nature and extent of Weinstein's and Fried's duties and activities, concluded that each was a "fiduciary" within the meaning of § 249.[4] The District Court thereupon ordered that

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[3] At the time of filing of the petition, Weinstein was both a director of the Debtor and its President. Fried had previously been a director and Secretary-Treasurer, but resigned those posts before the filing of the petition, and continued to hold only the position of General Manager, apparently not an office provided for in the corporation's charter. The court originally authorized payment of a salary of $100 weekly to Fried, and nothing to Weinstein. Later Fried's salary was increased to $150 and eventually to $200 weekly, while provision was made for payment of $50 weekly to Weinstein. The District Court's orders with respect to Weinstein were apparently made pursuant to § 191 of the Act, 11 U. S. C. § 591, which permits a debtor in possession to "employ officers of the debtor at rates of compensation to be approved by the court." Since Fried was not an officer of the Debtor, but merely a salaried employee, explicit judicial approval of his continued employment and salary may not have been required. Cf. *In re Wil-low Cafeterias,* 111 F. 2d 429, 431.

[4] Since Weinstein was both an officer and a director of the Debtor and had conceded on cross-examination that he was a "fiduciary," no further inquiry concerning his corporate function was necessary, although the District Court did probe the nature and extent of his services. The court did, however, examine Fried at some length

their compensation be terminated, that Fried be discharged as General Manager, and that Weinstein, whose removal as President the court believed was beyond its powers, have nothing further to do with the management of the business.[5] The Court of Appeals reversed the order in its entirety on the ground that § 249 applied to neither Weinstein nor Fried. The Court of Appeals indicated that "doubtless" a literal reading of the statute's terms would include both, but held that § 249 was to be construed as applicable not to every "person acting in the proceedings in a representative or fiduciary capacity" but only to such persons in the particular capacities named in §§ 241, 242 and 243, 11 U. S. C. §§ 641, 642 and 643—petitioning creditors, court officers and their attorneys, indenture trustees, depositaries, reorganization managers, committees, creditors and stockholders, or their representatives, and the attorneys for

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concerning the nature of his powers and responsibilities in the management of the Debtor's business, and concluded:

". . . you were substantially more than a mere employee. You were no cop in the parking lot. You ran the business while Mr. Weinstein wasn't there. As you admitted, you operated the business and managed the property of the debtor. The fact that you consulted and got approval from the directors does not diminish your status in the structure of the debtor. You were the managing agent."

[5] The District Court held that § 189 of the Bankruptcy Act, 11 U. S. C. § 589, authorizing the court to supervise the operations of a debtor in possession, supported the order entered at the close of the hearings that "Jerome Fried will be discharged from the debtor's employ at once." The order as to Weinstein was that he "shall have nothing further to do with the operation of [the Debtor's] . . . business and affairs, and management of its property." The court acknowledged that consistency would have dictated the removal of Weinstein from office, "[b]ut I don't have that power." The District Court ordered further that neither Fried nor Weinstein should serve, even if willing to do so, without compensation. The Court of Appeals stayed this provision of the order pending decision of the appeal.

them or for "other parties in interest"—who under § 247 are entitled to a hearing upon applications for allowances after notice to certain interested groups and individuals. 296 F. 2d, at 682–683. In reversing the District Court on this ground the Court of Appeals found no occasion to consider the question whether in addition to denial of compensation removal from office was authorized or required where § 249 was applicable, since in its view "the order of removal cannot survive the fall of its underpinning." 296 F. 2d, at 683.

We disagree with the Court of Appeals. We hold that persons performing fiduciary functions such as those which the District Court found Weinstein and Fried had performed are subject to § 249.

## I.

The virtual immunity which active participants in corporate reorganizations enjoyed from judicial superintendence of abuses in the payment of compensation and allowances was one of the principal reasons for the enactment of § 77B of the Bankruptcy Act in 1934.[6] "There was the spectacle of fiduciaries fixing the worth of their own services and exacting fees which often had no relation to the value of services rendered," *Leiman* v. *Guttman*, 336 U. S. 1, 7. Section 77B, among other significant reforms, created important new judicial powers to regulate

[6] See, *e. g.*, S. Doc. No. 268, 74th Cong., 2d Sess. 59–63, which details certain abuses with respect to fees and allowances antedating the adoption of § 77B. See also Securities and Exchange Comm'n, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, pt. II, 348–373; pt. VIII, 221–231. Further background material is given in 6 Collier, Bankruptcy (14th ed. 1947), ¶ 13.18; Bandler, Securities Trading and Fee Sharing Under Chapter X of the Bankruptcy Act, 15 Record of the Assn. of the Bar of the City of New York 230–234 (1960).

the payment of compensation and the reimbursement of expenses. See *Dickinson Industrial Site, Inc.*, v. *Cowan*, 309 U. S. 382, 388–389. Passage of the Chandler Act four years later measurably strengthened these powers of judicial superintendence, particularly with respect to corporate reorganizations, through the new provisions of c. X, 11 U. S. C. §§ 501–676, see *Brown* v. *Gerdes*, 321 U. S. 178, 181–182. In curbing the pre-statutory abuses the general provisions of § 77B had proved inadequate.[7] Chapter X sought also to broaden the participation of interested groups in the reorganization by ensuring compensation to several classes which theretofore often served the estate as volunteers.[8]

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[7] There is much evidence that abuses of this kind survived the enactment of § 77B. See H. R. Rep. No. 1409, 75th Cong., 1st Sess. 37–38 (quoting statement of Commissioner William O. Douglas); Teton, Reorganization Revised, 48 Yale L. J. 573, 591–592, 605 (1939); Developments in the Law—Reorganization Under Section 77B of the Bankruptcy Act—1934–1936, 49 Harv. L. Rev. 1111, 1201–1202 (1936); Medill, Fees and Expenses in a Corporate Reorganization Under Section 77B, 34 Mich. L. Rev. 331, 363–364 (1936). For this and other reasons, the Chandler Act established a comprehensive and exclusive system of allowances for services and expenses in a reorganization, which precludes the granting of allowances not therein provided for. See *Brown* v. *Gerdes, supra; Lane* v. *Haytian Corp.*, 117 F. 2d 216, 219.

[8] Under the very general compensation and allowance provisions of § 77B, for example, courts were uncertain whether remuneration could be provided to stockholders who took an active part in and made valuable contributions to the reorganization. Thus the courts had divided as to the availability of compensation or reimbursement to this and other interested classes of participants. See, *e. g.*, 6 Collier, Bankruptcy (14th ed. 1947), ¶ 13.01. Specific provisions of Chapter X sought to resolve these ambiguities by enumerating with some precision the participants to whom allowances were available, §§ 241–243, 11 U. S. C. §§ 641–643, and the procedure by which application for allowances must be made, § 247, 11 U. S. C. § 647. See Steinberg, Salient Features in Awarding Allowances in Corporate Reorganization

No statutory sanction against trading in the Debtor's securities during a reorganization was provided before the Chandler Act. However, § 77B's broad mandate that fees and allowances must be "reasonable" to merit judicial approval had been held sufficient authority by two federal courts to sanction denial of compensation to persons holding fiduciary positions in reorganization proceedings who had traded in the Debtor's stock. *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 828, rev'd in part, 83 F. 2d 406; *In re Republic Gas Corp.*, 35 F. Supp. 300. These decisions found even in the general terms of the statute the embodiment of "ancient equity rules governing the conduct of trustees, including deprivation of compensation where there is a departure from those rules." 35 F. Supp., at 305.

The relevant legislative materials leave no doubt that the purpose behind § 249 was to codify the rule of these decisions and to give pervasive effect in Chapter X proceedings to the historic maxim of equity that a fiduciary may not receive compensation for services tainted by disloyalty or conflict of interest.[9] Cf. *Michoud* v. *Girod*,

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Proceedings and the Role of the Securities and Exchange Commission in Their Final Determination, 8 N. Y. L. Forum 253, 266 (1962); Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act, 52 Harv. L. Rev. 1, 36–37 (1938).

[9] To the effect that the draftsmen of § 249 intended to codify, and also to broaden the scope of, the *Paramount-Publix* and *Republic Gas* rule, see Hearings on H. R. 6439, before the House Committee on the Judiciary, 75th Cong., 1st Sess. 184 (statement of Commissioner William O. Douglas: "We visualized a lot of administrative difficulties in determining in a particular case whether or not actual inside information was used, and so we decided that the best practical way of doing it was to broaden the base a little bit and establish a rule of thumb and follow the pattern of the *Paramount case* and the *Republic Gas case*"). See also Douglas, Improvement in Federal Procedure for Corporate Reorganizations, 24 A. B. A. J. 875, 877 (1938);

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4 How. 503, 556–560; *Weil* v. *Neary*, 278 U. S. 160; *Magruder* v. *Drury*, 235 U. S. 106, 119–120. Indeed, we have several times declared that the general statutory authorization in the Bankruptcy Act for "reasonable" compensation for services "necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act." *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262, 268; see also *American United Mutual Life Ins. Co.* v. *Avon Park*, 311 U. S. 138.

Access to inside information or strategic position in a corporate reorganization renders the temptation to profit by trading in the Debtor's stock particularly pernicious. The particular dangers may take two forms: On the one hand, an insider is in a position to conceal from other stockholders vital information concerning the Debtor's financial condition or prospects, which may affect the value of its securities, until after he has reaped a private profit from the use of that information. On the other hand, one who exercises control over a reorganization holds a post which might tempt him to affect or influence corporate policies—even the shaping of the very plan of reorganization—for the benefit of his own security holdings but to the detriment of the Debtor's interests and those of its creditors and other interested groups.[10]

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Brudney, Insider Securities Dealings During Corporate Crises, 61 Mich. L. Rev. 1, 6–10 (1962).

The Chandler Act contained another provision which, although less explicit, was in the same vein. Section 221 (4), 11 U. S. C. § 621 (4), provides that the court shall confirm a plan of reorganization if, *inter alia*, all payments made or promised by the debtor for services and expenses in connection with the reorganization are "reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge . . . ." This provision was carried over in substance from more general provisions of § 77B, as a companion to the new and more specific provisions of § 249.

[10] Several courts have suggested that a paramount objective of § 249 was to check the misuse for private gain of inside information

Congress enacted two distinct types of sanctions to prevent these possible practices. One appears in § 16 (b) of the Securities Exchange Act, 15 U. S. C. § 78p (b), which prohibits the realization by insiders of short-swing profits from trading in their corporation's stock, even when the corporation is solvent. Cf. *Blau* v. *Lehman*, 368 U. S. 403. The other sanction, directed at preventing insider trading during insolvency or reorganization, appears in § 249; it denies to a "fiduciary" or "representative" any compensation or reimbursement if at any time during the proceeding he trades in the Debtor's stock. The two provisions are cumulative, not alternative.[11]

In the light of its clearly revealed objectives, no congressional purpose to exclude from § 249 insiders such as Weinstein and Fried—who are, as the District Court found, no less fiduciaries of the Debtor than committee members, trustees or attorneys—can be perceived. Certainly the possibilities for abuse of their access to inside information and its clandestine use for personal profit are

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or control, to which the position of a representative or fiduciary gives him access. See, *e. g.*, *Otis & Co.* v. *Insurance Bldg. Corp.*, 110 F. 2d 333, 335; *Finn* v. *Childs Co.*, 181 F. 2d 431, 441. See generally Steinberg, *supra*, note 8, at 265; Ferber, Blasberg and Katz, Conflicts of Interest in Reorganization Proceedings Under the Public Utility Holding Company Act of 1935 and Chapter X of the Bankruptcy Act, 28 Geo. Wash. L. Rev. 319, 365–379 (1959); Note, Conflict of Interests as a Factor in the Allowance of Representatives' Claims in Insolvent Corporate Reorganizations, 106 U. of Pa. L. Rev. 1139, 1160–1161 (1958); 63 Harv. L. Rev. 1057–1058 (1950).

[11] The common origins and parallel purposes of § 249 and § 16 (b) of the Securities Exchange Act have been outlined in 2 Loss, Securities Regulation (2d ed. 1961), 1124–1125. See also Brudney, *supra*, note 9, at 8–10. For analysis of the particular policies underlying § 16 (b) which require a similarly pervasive and unbending rule against certain forms of insider trading, see, *e. g.*, *Adler* v. *Klawans*, 267 F. 2d 840, 844; Cook and Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. 612, 622–623 (1953).

no less.[12] Thus throughout the context of corporate reorganization and bankruptcy, the decisions of this and other courts have recognized no substantial distinction between directors, for example, and officers or managing employees with respect to the obligation of loyal and disinterested service. "Since the officers and directors occupy fiduciary positions during this [reorganization] period, their actions are to be held to a higher standard than that imposed upon the general investing public." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 208. See also *Pepper* v. *Litton*, 308 U. S. 295, 306; *In re Los Angeles Lumber Prods. Co.*, 37 F. Supp. 708.

The policies underlying Chapter X and § 249 itself suggest two further reasons for not recognizing such a distinction. First, if the class of "fiduciaries" or "representatives" whose trading is regulated by § 249 was meant

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[12] Several courts have said that officers, like directors, are to be held to a fiduciary standard during insolvency or reorganization which might bring them within the prohibitions of § 249. *E. g., Gochenour* v. *Cleveland Terminals Bldg. Co.*, 118 F. 2d 89; *In re Jersey Materials Co.*, 50 F. Supp. 428; *In re Los Angeles Lumber Prods. Co.*, 46 F. Supp. 77, 89; cf. *In re Philadelphia & W. R. Co.*, 64 F. Supp. 738, 741. See also Teton, *supra*, note 7, at 603; Brudney, *supra*, note 9, at 20; 6 Collier, Bankruptcy (14th ed. 1947), ¶ 13.18, at 4591–4592.

The dangers of insider trading or misuse of information or position are not thought to be as applicable to trading by officers and directors of a solvent corporation not under judicial superintendence. Cf. *Manufacturers Trust Co.* v. *Becker*, 338 U. S. 304. Although a director, at least, is held always to certain fiduciary obligations while trading in the shares of his corporation, see Conant, Duties of Disclosure of Corporate Insiders Who Purchase Shares, 46 Cornell L. Q. 53 (1960), it has been suggested that it may actually be economically desirable for officers and directors to acquire a proprietary interest in a solvent corporation. See Berle and Means, The Modern Corporation and Private Property (1932), 122; Note, Fiduciary Duty of Officers and Directors Not to Compete With the Corporation, 54 Harv. L. Rev. 1191, 1196–1197 (1941).

to comprehend only reorganization committees, attorneys, trustees and the like, the enactment would have been superfluous in view of the fiduciary standard to which they were already bound under settled principles of equity. Even before the Chandler Act a committee member or dominant shareholder who profited from inside information during a reorganization was no more entitled to compensation for his services than the trustee of a private trust who compromised his loyalty. Cf. *Weil* v. *Neary, supra.* We have said that the inherent equity power of the bankruptcy court "embraces denial of compensation to those who have purchased or sold securities during or in contemplation of the proceedings." *American United Mutual Life Ins. Co.* v. *Avon Park, supra,* at 147. We can only conclude therefore that § 249 was meant to broaden the classes of fiduciaries to be subjected to this traditional sanction.

Second, to define "fiduciary" in § 249 as narrowly as has the Court of Appeals would invite a form of evasion and circumvention which could readily defeat the whole purpose of the statute's prophylactic rule. If only a director or corporate attorney were disqualified from trading during the reorganization, how easily a director-officer could avoid the ban by relinquishing his directorship while retaining his office and therefore his access to inside information. In other words, the mere shifting of titles could enable the very class at which the regulation was directed to avoid its prohibitions. Congress plainly did not indulge in an exercise in futility in enacting § 249.

In terms of the purposes and the underlying policies of § 249 there is therefore no justification for the Court of Appeals' construction exempting Weinstein and Fried. We turn now to the parsing of the provisions of the Bankruptcy Act by which the Court of Appeals reached its conclusion.

## II.

Article XIII of Chapter X, of which § 249 is a part, provides generally for matters of "compensation and allowances." Sections 241, 242 and 243 authorize the bankruptcy court to allow reimbursement and compensation to the persons specifically named in those sections.

The Court of Appeals concluded that the prohibitions of § 249 apply only to those persons named in §§ 241–243, who are required to apply to the court for compensation or reimbursement under § 247. The Court of Appeals reasoned from the location of § 249 within the article that only the "strangers" to the corporation mentioned in §§ 241, 242 and 243, whose services would not have been rendered but for the reorganization, and who could not therefore have been compensated without judicial approval, could be taken to be within § 249. The court buttressed this reading by reference to distinct and separate sections of the Act providing for the compensation of officers and employees.

Our reading of the same sections leads us to the contrary conclusion; in our view they support our broader reading of § 249. First, it is significant that the coverage of § 249 is defined in terms quite unlike those of the earlier sections of the article. While §§ 241–243 and § 247 detail with care the classes of persons to whom compensation is to be allowed and by whom application is to be made, § 249 speaks generally of "any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity . . . ." Had the Congress meant the coverage of this section to be coextensive with that of its predecessors in the article, it would presumably either have referred expressly to the earlier sections as the guidelines for § 249, or would have enumerated the same groups again in

essentially the same terms. That the draftsmen of § 249 used neither readily available approach suggests that the superintendence of § 249 was meant to transcend the bounds of the article.

Further parsing of the statute reinforces this conclusion. There is, for example, no mention in §§ 241–243 or § 247 of the directors of the Debtor corporation. Yet there seems little doubt that directors, who are fiduciaries even of a solvent corporation and its shareholders, may be brought within the prohibitions of § 249 if they trade in the Debtor's stock. See *In re Los Angeles Lumber Prods. Co., supra,* at 711. On the other hand, it is not entirely correct to say that Article XIII authorizes allowances only for "strangers" whose services would neither have been rendered nor become compensable save for the reorganization. Both the indenture trustee and the attorney for the Debtor are, for example, expressly named as Article XIII applicants, required under § 247 to seek compensation, at least for services pursuant to the reorganization. Neither can properly be considered a "stranger" whose relationship to and services for the corporation arise solely out of the petition for reorganization.

We turn next to the argument that § 249 cannot have been intended to embrace officers and employees in light of certain provisions concerning their compensation in Article VIII. Section 191, for example, authorizes the Debtor in possession to "employ officers of the debtor at rates of compensation to be approved by the court." The suggestion is that once the court has approved a rate of compensation under that section, such approval must be taken to immunize the officer from the sanctions of § 249. We cannot accept that suggestion, for surely there are various forms of disloyalty or conflict of interest which would disentitle an officer to com-

pensation under general principles of equity and quite without regard to any statutory prohibition.[13]

The approval of an officer's rate of compensation does not confer an immunity from equitable sanctions, nor can it immunize him from § 249. Section 191 does no more than vest the court with additional authority to pass in advance upon the qualifications and the salary of an officer of the Debtor before he assumes or continues in office. There is no suggestion in that section or elsewhere that such approval was intended to diminish in any way the court's statutory powers over fees and allowances conferred broadly by the Chandler Act. That officers and other employees may receive their compensation on a weekly or monthly basis while other persons subject to § 249, such as attorneys and trustees, customarily serve without compensation until the conclusion of the proceeding, is a difference without legal significance in this context.[14] The application of § 249 turns not upon the

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[13] See, *e. g.*, *In re Midland United Co.*, 159 F. 2d 340, 345–346. Thus, even where the prohibitions of § 249 are for one reason or another not applicable to a particular insider transaction during reorganization, bankruptcy courts have consistently recognized the existence of inherent equity power to disallow or at least to reduce claims for compensation or reimbursement. See *In re Cosgrove-Meehan Coal Corp.*, 136 F. 2d 3, 6 (C. A. 3d Cir.); *Chicago & West Towns Railways* v. *Friedman*, 230 F. 2d 364 (C. A. 7th Cir.); *Berner* v. *Equitable Office Bldg. Corp.*, 175 F. 2d 218 (C. A. 2d Cir.). See also 2 Loss, Securities Regulation (2d ed. 1961), 1124–1125; Note, 106 U. of Pa. L. Rev. 1139, 1155 (1958).

[14] Respondents have contended that subjecting a salaried employee to the provisions of § 249 would impose insuperable administrative problems, because the employee would be required to make application to the court at the end of each pay period before payment of his salary would be authorized. The contention would have merit only if officers and employees were also within the class of applicants to whom the requirements of § 247 apply; but such a result is not, for reasons already discussed, inevitable. Indeed, the salary of a nonofficer employee need not even be approved *in advance* of his

manner in which, or the time at which, payment is made, but rather upon the nature of the services and responsibilities which are being compensated.

Consideration of the function and responsibility of the officers of a Debtor corporation left in possession also supports our construction. The concept of leaving the Debtor in possession, as a "receivership without a receiver," [15] was designed to obviate the need to appoint a trustee for the supervision of every small corporation undergoing reorganization, even though it appeared capable of carrying on the business during the proceeding. Continued possession by the Debtor, authorized by § 156, is subject at all times to judicial termination and the appointment of a disinterested trustee under § 159. But so long as the Debtor remains in possession, it is clear that the *corporation* bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession.[16] Moreover, the duties which the corporate Debtor in possession must perform during the proceeding are substantially those imposed upon the trustee, § 188. It is equally apparent that in practice these fiduciary responsibilities fall not upon the inanimate

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employment, *In re Wil-low Cafeterias*, 111 F. 2d 429; and while the *rate* of compensation of an officer must be approved initially under § 191, nothing either in that section or in § 247 suggests that weekly or monthly applications for the *payment* of salary at that rate are also required. Rather, employees and officers receive compensation during the proceeding subject to whatever fiduciary obligations are incumbent upon them, and contingent upon their continued fulfilment of those obligations.

[15] The phrase was suggested by SEC Commissioner (later Judge) Jerome Frank, in Hearings on H. R. 8046 before a Subcommittee of the Senate Judiciary Committee, 75th Cong., 2d Sess. 99.

[16] See, *e. g.*, *In re Avorn Dress Co.*, 78 F. 2d 681, 683; *In re Los Angeles Lumber Prods. Co.*, 46 F. Supp. 77, 88; Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act, 52 Harv. L. Rev. 1, 18–19 (1938).

corporation, but upon the officers and managing employees who must conduct the Debtor's affairs under the surveillance of the court,[17] §§ 188–191. If, therefore—as seems beyond dispute from the very terms of the statute—the trustee is himself a fiduciary within the meaning of § 249, logic and consistency would certainly suggest that those who perform similar tasks and incur like obligations to the creditors and shareholders should not be treated differently under the statute for this purpose.[18]

The foregoing discussion answers two further arguments grounded on statutory construction. First, it has been contended that officers and managing employees must be deemed to be outside § 249 because their compensation derives from "consensual arrangements" and because they were compensated before the filing of the petition for the very services they continue to perform thereafter. The suggestion overlooks, with respect to officers at least, the requirement imposed by § 191 of judicial approval not only of salary but of the holding of office itself. More important, as to both officers and managing employees, the suggestion fails to appreciate the change which the filing of the petition and judi-

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[17] See 6 Collier, Bankruptcy (14th ed. 1947), 2441–2442. Cf. Securities and Exchange Comm'n, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, pt. I, 312–329, 868–872.

[18] One commentator has observed of the Court of Appeals' decision in this case: "While the court concluded that . . . [the respondents] were not acting in a fiduciary capacity for purposes of § 249, it recognized that such persons owed fiduciary obligations to the corporation which extended to their dealing in its securities. To the extent that the court's opinion can be read to suggest only selective accountability for profits from such transactions, it is at odds with the rigorous rule of accountability embodied in earlier decisions." Brudney, Insider Securities Dealings During Corporate Crises, 61 Mich. L. Rev. 1, 35, n. 109, at 36 (1962). For a similar view of this case see 48 Va. L. Rev. 751, 755–756 (1962).

cial approval of the Debtor's remaining in possession necessarily cause in the *obligations,* if not in the day-to-day *activities* of all responsible officials. The difference in an officer's status and responsibilities before and after the start of a reorganization is most clearly reflected in the § 191 requirement of judicial approval upon which an officer's or director's continued service is contingent. The broader principle which underlies that requirement and emphasizes the change in responsibility is that the court's willingness to leave the Debtor in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee. And if they default in this respect, the court may at any time replace them with an appointed trustee.

Finally, it is suggested that important differences between "what is demanded of a trustee and what is expected of officers of a debtor in possession" require the omission of the latter from § 249. 296 F. 2d, at 683. The argument proves too much, for surely the prohibitions of § 249 cover persons other than the trustee—various groups such, at the least, as those listed in §§ 241–243, who are held to a fiduciary standard although, unlike the trustee himself, they need not be "disinterested" within the meaning of § 158 (1). That the officers of a Debtor in possession are not "trustees" for all purposes is beyond dispute, but that proposition does not provide an answer to the question before us—which of those persons who are *not* disinterested and could *not* therefore serve as trustees under § 156 may nonetheless be regarded as *fiduciaries* within the meaning of § 249.

In concluding as we do that an officer or a managing employee of a Debtor in possession may be a fiduciary for purposes of § 249, we do not mean to suggest that one who holds such a position is *necessarily* within that section. That question requires in each case a careful exam-

ination of the nature of the particular applicant's activities, powers and responsibilities in connection with the reorganization. As to certain classes of participants—committee members and attorneys, for example—the very terms of § 249 clearly make its sanctions applicable. As to other groups—salaried employees who take no part in the management of the Debtor, for instance—it may be equally clear that § 249 was not meant to impose any ban on trading in the Debtor's stock. But in the case of an officer or managerial employee, the question whether the particular applicant is a "fiduciary" under the statute is one which requires careful appraisal of the relevant facts.[19]

In this case the District Court took evidence concerning both Fried's and Weinstein's activities and responsi-

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[19] In the context of § 16 (b) of the Securities Exchange Act, for example, it is clear that a determination of who is a corporate "officer" within the meaning of the statute requires a flexible assessment of particular powers and responsibilities rather than a rigid rule of thumb. So the Court of Appeals for the Second Circuit has held, *Colby* v. *Klune*, 178 F. 2d 872. In that case Judge Jerome Frank observed on a question quite similar to the one now before us, "the functions of a 'vice-president' or 'comptroller' are not so well settled as to be self-evident, and there is need for evidence concerning those functions. . . . The question is what this particular employee was called upon to do in this particular company, *i. e.*, the relation between his authorized activities and those of this corporation." 178 F. 2d, at 875.

Similarly, the question of when a stockholder participating in a reorganization proceeding is acting in a "representative" capacity within the meaning of § 249, is one which requires an examination of the particular facts. See, *e. g.*, *Young* v. *Potts*, 161 F. 2d 597; *Finn* v. *Childs Co.*, 181 F. 2d 431. In *Young* v. *Higbee Co.*, 324 U. S. 204, we undertook just such an analysis of the activities of two stockholders in order to determine, for a different but related purpose, whether they had served during the reorganization in a "representative" capacity. Cf. *Pepper* v. *Litton*, *supra*. And see Note, Bankruptcy: Corporate Reorganization: Survey of Chapter X in Operation, 18 N. Y. U. L. Q. Rev. 399, 475 (1941).

bilities, and concluded that each was for these purposes a "fiduciary." Unless the District Court erroneously interpreted the statute, which we have held it did not, its findings as to the status of the respondents should bind our review of the case. Since there was ample evidence to support those findings, and the Court of Appeals did not question them, § 249 applies to Weinstein and Fried.

## III.

But the bare holding that § 249 has been violated does not automatically determine the consequences of such a violation. We turn now to that aspect of the case. There is no doubt that proof of trading in contravention of the statute requires at least the denial of any application for past compensation then pending, and the disallowance of all future compensation.[20] The District Court went so far but declined to go further. We must now consider whether the District Court was also required, in order fully to effectuate the policies of § 249, to order restitution or recoupment of salaries already received by Fried and Weinstein for their beneficial services to the Debtor. As we have observed, the fact that these salaries

[20] See, *e. g.*, *Surface Transit, Inc.*, v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862. Moreover, proof of trading in violation of § 249 forfeits any claim to reimbursement for expenses incurred by the applicant in connection with the proceeding. *In re Inland Gas Corp.*, 309 F. 2d 176. It should be unnecessary to add that such sanctions are imposed not as penalties upon the trading itself—for other principles govern the extent to which and conditions under which an insider may profit from investment in the Debtor's securities during the proceeding. Rather, the rationale underlying the denial of compensation and expenses is that allowances may be made, under general equitable limitations and the statutory provisions alike, only for "loyal and disinterested service in the interest of those for whom the claimant purported to act." *Woods* v. *City Nat. Bank & Trust Co.*, *supra*, at 268. Section 249 does no more than declare that one who invests in the Debtor's stock during a reorganization ceases to be disinterested for purposes of compensation and allowances.

have already been paid under approval of the court does not necessarily preclude their recoupment.

It is argued, however, that to require restitution at this late date, particularly when the trading involved small amounts of stock and was carried on apparently in good faith and without knowledge of the existence of § 249, imposes an unduly harsh sanction—a remedy disproportionate to the offense. While we recognize that in a case such as this the remedy is indeed a severe one, we cannot find that Congress intended anything less. To hold that one who trades in violation of § 249 forfeits only his right to *future* compensation would place a premium on concealment of transactions in the Debtor's stock and thereby jeopardize the salutary policies of the statute. Moreover, it is well settled that when the question arises in a terminal application for compensation or reimbursement under § 247, an applicant who has engaged in forbidden transactions near the end of the proceeding is to be denied compensation for all services he has rendered to the Debtor, however valuable those services may have been.[21] Thus the policies of the statute afford no alternative but to order the restitution of all amounts of compensation and reimbursement received by these respondents since the start of the reorganization.

If the remedy seems harsh in this case, it is wholly consistent with the uniform application of this statute by the lower courts. As the Court of Appeals for the Second Circuit has recognized in an earlier case, "[t]his result may well work harshly in individual cases . . . . But in § 249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations. . . . In the past excuses of inadvertence or *de minimis* have not been per-

[21] Cf., *e. g.*, *In re Cosgrove-Meehan Coal Corp.*, 136 F. 2d 3.

mitted to undermine the section . . . ." *Surface Transit, Inc.*, v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862, 868 (C. A. 2d Cir.). The lower federal courts have uniformly found it immaterial to the application of § 249, for example, that the extent of trading may have been minimal; that the applicant may never have realized the profit from the transaction, or may actually have suffered a loss; that the trading may have been done in response to a personal or corporate emergency; or that the applicant may neither have possessed nor attempted to acquire inside information bearing on the value of the Debtor's stock.[22] In light of the seriousness of the abuses which the statute was designed to prevent, it has been thought that to allow any such exception or dispensation would frustrate the manifest intent of Congress to impose an effective prophylactic rule.[23] That the rule occasionally bars compensation to those whose conduct might not have been considered inequitable or disloyal in the absence of such a statute is

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[22] See, *e. g.*, *In re Midland United Co.*, 159 F. 2d 340; *In re Central States Electric Corp.*, 206 F. 2d 70; *Surface Transit, Inc.*, v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862; *In re Arcade Malleable Iron Co.*, 35 F. Supp. 461; *In re Norwalk Tire & Rubber Co.*, 96 F. Supp. 274. Several cases have recognized narrow exceptions to § 249 where the trading was carried on by a relative of the applicant or claimant, without his knowledge and not for his account, *e. g.*, *Nichols* v. *Securities & Exchange Comm'n*, 211 F. 2d 412. But where the trading has been done with the applicant's knowledge or for his account, it is immaterial that he may not realize whatever profit results, *In re Central States Electric Corp., supra; In re Midland United Co.*, 64 F. Supp. 399, 415–416. See generally, 45 Va. L. Rev. 1070–1071 (1959).

[23] See generally, *e. g.*, *In re Inland Gas Corp.*, 309 F. 2d 176; 11 Remington, Bankruptcy (Hayes rev. ed. 1961), 535–538; Teton, Reorganization Revised, 48 Yale L. J. 573, 602–603 (1939); Bandler, Securities Trading and Fee Sharing Under Chapter X of the Bankruptcy Act, 15 Record of the Assn. of the Bar of the City of N. Y. 230 (1960).

no reason to suspend or make selective the operation of the statute's sanctions.

We do not agree, however, that a violation of § 249 of itself requires the discharge of the violator from his corporate office. While a bankruptcy court possesses extensive power over the tenure and the conduct of officers and employees, and might find that trading during the reorganization rendered an officer unfit for further service to the Debtor, even without compensation, that result does not follow inexorably.[24] In the present case the District Court apparently relieved Fried and Weinstein of their corporate responsibilities solely because of the violation of § 249. The Court of Appeals, finding no violation, saw no occasion to determine whether the discharge of the respondents might nevertheless be justified by considerations outside that section.

The question of the bankruptcy court's power to remove a corporate officer is a difficult and complex one, in which state and federal law may be intricately interwoven.[25] We therefore intimate no view concerning

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[24] See Ferber, Blasberg and Katz, Conflicts of Interest in Reorganization Proceedings Under the Public Utility Holding Company Act of 1935 and Chapter X of the Bankruptcy Act, 28 Geo. Wash. L. Rev. 319, 360 (1959). As the District Court noted in ordering the removal of Fried, a bankruptcy court possesses considerable authority to supervise the employment policies of a Debtor in possession under §§ 188–191. It is not clear whether the District Court found a basis in its general powers for the removal of Fried and the termination of Weinstein's active duties, for it appears that the court was principally if not exclusively influenced by the violation of § 249. We do not mean to suggest that a violation of § 249 might not, standing alone, justify an order for the violator's discharge, but only to make clear that this result does not follow automatically. In any event, we think that we should not undertake to decide this question without first having the view of the Court of Appeals.

[25] It is not clear why the District Court felt powerless to order Weinstein's removal from his corporate office. Nor is it clear to what extent the court felt the question of its power to be governed by

either the court's powers with respect to the removal of an officer, or the propriety of exercising in this case whatever powers may exist. That question must be reconsidered by the courts below in the light of our holding that the conduct of the respondents did constitute a violation of § 249 which disentitles them to all compensation.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with the dismissal of the writ respecting the issues involved in *Fried* v. *Margolis*, 296 F. 2d 670, but would affirm the judgment of the Court of Appeals in the *Nazareth* case, 296 F. 2d 678, relating to § 249 of the Bankruptcy Act. On that score I fully agree with Judge Friendly that at "the very least, courts are justified in demanding a clear indication of Congressional purpose before inflicting" such a "Draconian penalty" (296 F. 2d, at 683) as the Court's decision now imposes on petitioners Weinstein and Fried. The very triviality of the transactions involved in this particular case cautions against acceptance of the Court's ready construction of § 249.

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pertinent state law. Although § 191 gives to the bankruptcy court the power to approve or disapprove an officer's assumption of office and his rate of compensation, there is a question to what extent those powers also comprehend a power of removal as a matter exclusively of federal law. We have no occasion to decide such questions at this stage of the proceeding.

692-437 O-63—46

# ARROW TRANSPORTATION CO. ET AL. *v.* SOUTHERN RAILWAY CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 430. Argued January 10, 1963.—Decided April 15, 1963.

The Interstate Commerce Commission suspended for the maximum statutory period of seven months a schedule of reduced railroad rates on multiple-car grain shipments from certain Mississippi and Ohio River ports to various points in the Southeastern United States, pending a determination as to whether the reduction was lawful. It had not decided that question when the seven-month period expired, and petitioners sued to enjoin respondent railroads from effecting the reductions pending the Commission's decision. They claimed that application of the new rates would irreparably injure their respective economic interests, particularly because they threatened to force the petitioner barge line out of business. After a brief hearing, the District Court concluded that there was great danger of irreparable harm or injury to petitioners if the proposed rates went into effect; but that it had no jurisdiction to grant injunctive relief extending the period of suspension, because § 15 (7) of the Interstate Commerce Act vested exclusive power in the Commission to suspend a proposed change of rates for a limited time. The Court of Appeals affirmed. *Held:* The judgment is affirmed. Pp. 659–673.

(a) A review of the history of the suspension power indicates that Congress intended in § 15 (7) to vest in the Commission exclusive power to suspend proposed rate changes, and to withdraw from the courts any pre-existing power to grant injunctive relief to parties protesting the changes. Pp. 662–669.

(b) The foregoing conclusion is buttressed by a consideration of the practical consequences of survival of an injunction remedy—including, *inter alia*, the dangers of judicial intrusion into the administrative domain. Pp. 669–672.

(c) Injunctive relief is not authorized in this case by the National Transportation Policy, which obligates the Commission, not the courts, to balance the interests of competing forms of transportation. Pp. 672–673.

308 F. 2d 181, affirmed.

*John C. Lovett* argued the cause for petitioners. With him on the briefs was *Donald Macleay.*

*Dean Acheson* argued the cause for respondent Southern Railway Co. With him on the brief was *Francis M. Shea.*

*Ralph S. Spritzer,* by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum.*

Briefs of *amici curiae,* urging affirmance, were filed by *Whiteford S. Blakeney* for Statesville Flour Mills; by *John W. Vardaman* for Walley Milling Company; by *Eugene Cook,* Attorney General of Georgia, *Paul Rodgers,* Assistant Attorney General, and *Walter R. McDonald* for the Southern Governors' Conference et al.; and by *Austin L. Roberts, Jr.* and *R. Everette Kreeger* for the National Association of Railroad and Utilities Commissioners.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A schedule of reduced rates proposed by the respondent rail carriers was suspended by the Interstate Commerce Commission for the maximum statutory period of seven months pending a determination whether the reduction was lawful. The statute [1] expressly provides that "the

[1] 49 U. S. C. § 15 (7):

"Whenever there shall be filed with the Commission any schedule stating a new . . . rate . . . the Commission shall have . . . authority, either upon complaint or upon its own initiative without complaint, at once . . . to enter upon a hearing concerning the lawfulness of such rate . . . and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate . . . but not for a longer period than seven months beyond the time when it

proposed change of rate . . . shall go into effect," if the Commission's proceeding has not been concluded and an order made within the period of suspension. The Commission did not reach a decision within seven months, or within the following five months during which the respondents voluntarily postponed the change, and the respondents announced that the reduced rates would be put in effect. Thereupon the petitioners [2] brought this

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would otherwise go into effect; and after full hearing, whether completed before or after the rate . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period . . . ."

[2] The petitioners are a barge line, Arrow Transportation Co., a competitor of the respondent railroads for grain carriage; a municipality, Guntersville, Alabama, served by Arrow; a grain merchant, O. J. Walls, located in that municipality; and a grain consumer, John D. Bagwell Farms & Hatchery, Inc., which receives its grain by truck from Guntersville. The rate reductions which respondents have filed cover the shipment of grain to various points in the Southeastern United States, but apply only to multiple-car shipments from certain Mississippi and Ohio River ports. The Commission, following a complaint by competing barge lines and other parties, and on the basis of a recommendation of its Suspension Board, made a tentative finding that the proposed rates would be "unjust and unreasonable, in violation of the Interstate Commerce Act," and would "constitute unfair and destructive competitive practices in contravention of the National Transportation Policy." After the full hearing, however, Division 2 of the Commission, on January 21, 1963, concluded that Southern's rates at least were compensatory and reasonable, *Grain in Multiple-Car Shipments—River Crossings to the South,* I. & S. Docket No. 7656. That decision is now awaiting reconsideration by the full Commission.

The four petitioners have contended throughout this litigation that the application of the proposed new rail rates will irreparably injure their respective economic interests, particularly because they threaten to force Arrow out of business. Petitioners further contend that the proposed rates, being substantially lower than the competitive barge

action in the District Court for the Northern District of Alabama to enjoin the respondents from making the change effective pending the Commission's decision. The District Court concluded after examination of the pleadings and a brief hearing that "there is grave danger that irreparable injury, loss or damage may be inflicted on . . . [petitioners] if the proposed rates go into effect . . . for which . . . [petitioners] will have no adequate remedy at law." [3] The court held, however, that § 15 (7) vested

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rates in effect at the time of filing, unlawfully discriminate against a competing form of transportation. The reductions, in petitioners' view, will benefit only those users of grain who are equipped to receive very large rail shipments, to the detriment of all receivers off the rail routes, and the smaller rail-side purchasers who lack facilities for receipt and storage of multiple-car shipments. Southern responds that its reductions, at least, were made possible by technological innovations and efficiencies culminating in the inauguration of new aluminum freight cars designed especially for carriage of large grain shipments. Southern also maintains that the proposed rates are both nondiscriminatory and compensatory, and have been necessitated by vigorous competition against the railroads by unregulated motor carriers on certain routes which the barge lines do not serve.

In the course of the hearings before the Commission, the proposed rates were supported by representatives of the United States Department of Agriculture, the Southern Governors' Conference, the Southeastern Association of Railroad and Utilities Commissioners, and by various receivers and users of grain throughout the Southeast. On the other hand, the rates were protested by certain barge lines besides Arrow, several receivers of grain by barge, the Tennessee Valley Authority, flour milling interests and certain boards of trade outside the Southeast.

[3] The District Court concluded in its memorandum following an oral argument:

". . . I have convinced myself that should this Court have jurisdiction of this matter, it should consider all of these matters most carefully and deliberately before denying injunctive relief to plaintiffs. At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in deter-

exclusive power in the Commission to suspend a change of rate for a limited time and thereby precluded District Court jurisdiction to grant injunctive relief extending the statutory period. The Court of Appeals for the Fifth Circuit affirmed, stating, "Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power." 308 F. 2d 181, 186. We granted certiorari, 371 U. S. 859.[4] We affirm the judgment of the Court of Appeals.

I.

The Interstate Commerce Commission was granted no power to suspend proposed rate changes in the original

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mining this issue but to be sure that the parties conclude the hearings as speedily as possible. However, lacking jurisdiction, I find myself powerless to grant the relief sought; therefore, at this time it is the judgment of the Court that the motion for preliminary injunction be, and the same is hereby denied. At the same time I am denying defendants' motion to dismiss this case."

The District Court's formal order, entered the following day, denied both the petitioners' motion for a preliminary injunction and the respondents' motion to dismiss.

[4] One judge of the Court of Appeals granted petitioners' motion for a temporary restraining order on August 3, 1962, the day on which the order of the District Court issued. On August 8, however, a panel of the Court of Appeals denied petitioners' application for a restraining order pending decision of the appeal. Thereafter, but before oral argument in the Court of Appeals, MR. JUSTICE BLACK issued an order extending the Court of Appeals' restraining order pending the presentation and disposition by this Court of a petition for certiorari. The Court of Appeals rendered its opinion on September 7, 1962, and we granted certiorari on October 15. We invited the Solicitor General to file a brief expressing the views of the United States, and he filed a brief for the United States as *amicus curiae*. Southern was the only railroad which opposed certiorari or argued the merits of the case before this Court.

Act of 1887. That power first appeared among the 1910 amendments introduced by the Mann-Elkins Act.[5] The problem as to whether the application of new rates might be stayed pending decision as to their lawfulness first emerged after the Commission was empowered by the Hepburn Act of 1906 to determine the validity of proposed rates. In the absence of any suspension power in the Commission, shippers turned to the courts for injunctive relief. The results were not satisfactory. The lower federal courts evinced grave doubt whether they possessed any equity jurisdiction to grant such injunctions, and the availability of relief depended on the view of a particular court on this much controverted issue.[6] The Interstate Commerce Commission was more concerned, however, with certain practical consequences of leaving the question with the courts. In its Annual Reports for the three years before 1910 the Commission had directed attention to the fact that such courts as entertained jurisdiction were reaching diverse results, which engendered confusion and produced competitive inequities. The large expense entailed in prosecuting an action and financing a substantial bond proved prohibitive for many small shippers of modest means. Even when a large shipper secured an injunction, the scope of its relief often protected only that particular shipper, leaving his weaker

[5] 36 Stat. 552.

[6] The cases decided between 1906 and 1910 disclose the judicial uncertainty about the availability of any equitable relief. Compare, *e. g., Northern Pac. R. Co.* v. *Pacific Coast Lumber Mfrs. Assn.*, 165 F. 1 (C. A. 9th Cir. 1908); *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. R. Co.*, 156 F. 160 (C. C. D. S. D. 1907) with, *e. g., Atlantic Coast Line R. Co.* v. *Macon Grocery Co.*, 166 F. 206 (C. A. 5th Cir. 1909), aff'd on other grounds, 215 U. S. 501; and *Wickwire Steel Co.* v. *New York Cent. & H. R. R. Co.*, 181 F. 316 (C. A. 2d Cir. 1910). See for a contemporary view that courts lacked such injunctive powers over proposed rates, 1 Drinker, The Interstate Commerce Act (1909), § 243.

competitors at the mercy of the new rate.[7] Therefore, the Commission reported to Congress, ". . . as a practical matter the small shipper who can not file the bond can not and does not continue in business under the higher rate." I. C. C. Annual Report, 1908, p. 12. As an equally serious consequence, the regulatory goal of uniformity was jeopardized by the diverse conclusions reached by different District Courts—even, it appears, as to the reasonableness of a particular rate change. This resulted in disparity of treatment as between different shippers, carriers, and sections of the country, causing in turn "discrimination and hardship to the general public." I. C. C. Annual Report, 1907, p. 10.

It cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates. However, we cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head.

Moreover, Congress engaged in a protracted controversy concerning the period for which the Commission might suspend a change of rates. Such a controversy would have been a futile exercise unless the Congress also meant to foreclose judicial power to extend that period. This controversy spanned nearly two decades. At the outset in 1910, the proposal for conferring any such power on the Commission was strenuously opposed. The car-

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[7] See *In re Advances in Rates—Western Case*, 20 I. C. C. 307, 313–314; Dixon, The Mann-Elkins Act, 24 Quarterly Journal of Economics, August 1910, p. 593, at 603; Crook, The Interstate Commerce Commission, 194 North American Review, December 1911, p. 858, at 867.

riers contended that any postponement of rate changes would result in loss of revenue or competitive advantages fairly due them in the interim if the rates were finally determined to be lawful. But this opposition eventually took the form of efforts to limit the time for which suspension might be ordered by the Commission.[8] The Mann-Elkins Act authorized a suspension for an initial period not to exceed 120 days with a discretionary power in the Commission to extend the period for a maximum additional six months.[9] Ten years later the Esch-Cummins Act of 1920 cut the authorized period of extension from six months to 30 days,[10] thus reducing from 10 to five months the overall period for which the Commission might order a suspension. Congress was aware throughout the consideration of these measures that some shippers might for a time have to pay unlawful rates because a proceeding might not be concluded and an order made within the reduced time.[11] To mitigate that hardship,

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[8] The Administration originally recommended a period of 60 days; congressional proponents of suspension urged in response an unlimited suspension power, see 45 Cong. Rec. 6409. The Commission itself originally proposed a period of 120 days; the Senate Committee which reported on the Senate version of the bill recommended 90 days, S. Rep. No. 355, 61st Cong., 2d Sess. 9. For other stages of the legislative give-and-take which finally produced a period of 10 months as the maximum suspension term, see 45 Cong. Rec. 3373–3374, 3472, 4109–4110, 6500–6501, 6503, 6509, 6510–6511, 6783–6784, 6787–6788, 6900–6901, 6915–6921, 8239, 8473.

[9] 36 Stat. 552.

[10] 41 Stat. 486–487. Section 418 of the Esch-Cummins Act also added an express provision that if the hearing had not been concluded at the expiration of the 30-day extension period, "the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period . . . ."

[11] See, *e. g.*, Statement of Commissioner Clark, Hearings on H. R. 4378 before House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess. 91, 2944; H. R. Rep. No. 456, 66th Cong., 1st Sess. 20–21. President Taft's 1910 message expressly adverted to

the 1920 amendments authorized the Commission in such cases to require the carriers to keep detailed accounts of charges collected and to order refunds of excess charges if the Commission ultimately found the rates to be unlawful.[12] The suspension provisions took their present form, vesting authority in the Commission to suspend for a maximum period of seven months, in the Act of 1927.[13] The accounting and refund provisions of the 1920 law remained. Thus, as we have observed before, the present limitation was "formed after much experimentation with the period of suspension . . . ." *Interstate Commerce Comm'n* v. *Inland Waterways Corp.*, 319 U. S. 671, 689.

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the possibility that the hearings might outlast the suspension period. 45 Cong. Rec. 380.

A recent summary indicates that only about three-fifths of the investigation and suspension proceedings are completed within the seven-month period, but only four percent of such cases require more than a year. Remarks of Commissioner Charles A. Webb, in Expedition of Commission Proceedings, A Panel Discussion, 27 I. C. C. Prac. J. 15, 16 (1959). Professor Sharfman is authority that at the time he wrote it was invariably the practice of carriers voluntarily to extend the period at least with respect to proposed increases. 1 Sharfman, The Interstate Commerce Commission (1931), 203.

[12] Section 418 of the Transportation Act of 1920, 41 Stat. 484, 486–487, amending § 15 of the Interstate Commerce Act.

[13] 44 Stat. 1447–1448. See S. Rep. No. 1508, 69th Cong., 2d Sess. 4. Since the enactment of § 15 (7), similar suspension provisions have been included in numerous other regulatory statutes. See 49 U. S. C. §§ 316 (g), 318 (c) (Motor Carrier Act); 49 U. S. C. § 907 (g), (i) (Water Carrier Act); 49 U. S. C. § 1006 (e) (Freight Forwarders Act); 47 U. S. C. § 204 (Federal Communications Act); 16 U. S. C. § 824d (e) (Federal Power Act); 15 U. S. C. § 717c (e) (Natural Gas Act); and 49 U. S. C. § 1482 (g) (Federal Aviation Act). The terms of these later statutes are virtually identical to those of § 15 (7), although the length of the prescribed suspension period varies. However, it should be apparent that nothing we hold with respect to § 15 (7) necessarily governs the construction and application of these other suspension provisions.

We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. This Court has previously indicated its view that the present section had that effect. In *Board of Railroad Comm'rs* v. *Great Northern R. Co.*, 281 U. S. 412, 429, Chief Justice Hughes said for the Court: "This power of suspension was entrusted to the Commission only." [14] The lower federal courts have also said as much.[15] And

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[14] *Great Northern* held only that the District Court lacked power to enjoin *intrastate* rates which had been duly prescribed by a state regulatory agency and which the railroads were protesting before the Interstate Commerce Commission as discriminatory against *interstate* commerce. Although, unlike this case, the situation there involved a danger of direct conflict between federal and state regulation, see 281 U. S., at 426–430, the reasoning there does suggest the Court was of the view that even in the absence of such a direct conflict, the federal courts might not enjoin proposed rates when the Commission lacked either the inclination or the power to do so.

[15] *E. g., M. C. Kiser Co.* v. *Central of Ga. R. Co.*, 236 F. 573 (D. C. S. D. Ga.), aff'd, 239 F. 718 (C. A. 5th Cir.); *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913, 916 (D. C. S. D. N. Y.); *Luckenbach S. S. Co.* v. *United States*, 179 F. Supp. 605, 609–610 (D. C. D. Del.), vacated in part as moot, 364 U. S. 280; cf. *Manhattan Transit Co.* v. *United States*, 24 F. Supp. 174, 177 (D. C. D. Mass.). See also *Director General* v. *Viscose Co.*, 254 U. S. 498, 502, recognizing on similar grounds that under the Transportation Act of 1920 the District Courts lacked power to enjoin the action of the Director General of Railroads in instituting changes of commodity classifications and similar terms: "[T]here was ample and specific provision made therein for dealing with the situation through the Commission,—for suspending the supplement or rule . . . ." 254 U. S., at 502. *Cantlay & Tanzola, Inc.*, v. *United States*, 115 F. Supp. 72 (D. C. S. D. Calif.), upon which petitioners rely, is not contrary. There the District Court found no need to enjoin or suspend the proposed rates because, *pendente lite*, the carriers had voluntarily restored the previous schedule. But the

the commentators on the matter have consistently supported the soundness of that view.[16]

There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.[17] This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction.

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court said: "The Congressional intent [underlying § 15 (7)] plainly is that the courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission.'" 115 F. Supp., at 83.

[16] See, *e. g.*, Professor Sharfman's view that "[u]pon failure of the Commission to issue an order within this prescribed period, the proposed changes in rates were automatically to become effective, although the Commission might continue its investigation and bring it to decision." 1 Sharfman, The Interstate Commerce Commission (1931), 202. A contemporary commentator's view of the operation of the new statute was as follows: "In other words, the Commission may suspend rates for ten months beyond their effective date but no longer, and if the investigation is not then complete, the rates automatically go into effect." Dixon, The Mann-Elkins Act, 24 Quarterly Journal of Economics, August 1910, p. 593, at 604. For a current view, see Brooks and Daily, The Commission's Power of Suspension and Judicial Review Thereof, 27 I. C. C. Prac. J. 589, 599 (1960).

[17] See also *Board of Railroad Comm'rs* v. *Great Northern R. Co.*, *supra*, at 429–430; *Director General* v. *Viscose Co.*, 254 U. S. 498, 504; *In re Advances in Rates—Western Case*, 20 I. C. C. 307, 313–314; Brooks and Daily, *supra*, note 16, at 605.

It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved in the instant case. We see no warrant in that omission, however, for a difference in result. Conflicts over rates between competing carriers were familiar to the Commission long before 1910; [18] indeed, the struggle between competing barge and rail carriers has been going on almost since railroads came onto the national scene. Indeed, in another provision of the very same statute Congress in 1910 dealt explicitly with the *reduction* of rates by railroads competing with water carriers: Section 4 (2) of the Act forbids a rail carrier competing with a water carrier to increase rates once reduced on a competitive service, unless "after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." 49 U. S. C. § 4 (2). In addition § 8 of the Act, 49 U. S. C. § 8, creates a private right of action for damages—based upon conduct violative of the Act—which might be available, though we have no occasion here to decide the question, to a competitor claiming that a proposed rate reduction had been grossly discriminatory. Our holding today therefore means only that the injunction remedy is not available to these petitioners, just as it is unavailable to shippers.

## II.

Our conclusion from the history of the suspension power is buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy. A court's disposition of an application for injunctive relief would seem to require at least

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[18] See Commissioner Eastman's description of the evolution of this competition, *Petroleum Products from New Orleans, La., Group*, 194 I. C. C. 31, 44.

some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain.[19] Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review.[20] These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission.[21] If an independent appraisal of the reason-

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[19] See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co., supra,* at 440–441; *Director General* v. *Viscose Co.,* 254 U. S. 498; *Baltimore & O. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 493–495. It has been pointed out that "the agencies, through their power to suspend or deny suspension, often make final determinations of what the rates shall be during the suspension period . . . ." 1 Davis, Administrative Law (1958), 442.

[20] 28 U. S. C. § 2325 requires the convening of a three-judge District Court pursuant to 28 U. S. C. § 2284 to enjoin even temporarily the operation or execution "of any order of the Interstate Commerce Commission . . . ."

The Court of Appeals also suggested—though the suggestion has not been challenged before this Court—that § 16 of the Clayton Act, 15 U. S. C. § 26, might independently bar the injunctive relief sought here. 308 F. 2d, at 185. That section restricts to the United States, in suits for violations of the antitrust laws, the right to seek injunctive relief against any common carrier "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." Its applicability would, of course, depend upon whether or not the petitioners' action rests upon claimed violations of the antitrust laws. Cf. *Central Transfer Co.* v. *Terminal Railroad Assn.,* 288 U. S. 469.

[21] See, *e. g., Carlsen* v. *United States,* 107 F. Supp. 398 (D. C. S. D. N. Y.); *Bison S. S. Corp.* v. *United States,* 182 F. Supp. 63 (D. C. N. D. Ohio); *Luckenbach S. S. Co.* v. *United States,* 179 F. Supp. 605 (D. C. D. Del.). But cf. *Amarillo-Borger Express, Inc.,* v. *United States,* 138 F. Supp. 411 (D. C. N. D. Tex.), vacated as moot, 352 U. S. 1028; *Seatrain Lines, Inc.,* v. *United States,* 168 F. Supp. 819 (D. C. S. D. N. Y.). Compare generally Goodman, The History and

ableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.[22]

Nor is the situation different in this case if it be suggested that a court of equity might rely upon the Commission's finding of unreasonableness which preceded the Commission's suspension order. The Commission's con-

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Scope of Federal Power to Delay Changes in Transportation Rates, 27 I. C. C. Prac. J. 245 (1959), with Brooks and Daily, The Commission's Power of Suspension and Judicial Review Thereof, *id.*, 589 (1960).

[22] Thus we do not reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. Cf., *e. g.*, *Scripps-Howard Radio, Inc.*, v. *Federal Communications Comm'n*, 316 U. S. 4; *West India Fruit & S. S. Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775; *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, and has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.

It has also been suggested that a judicial power of this sort may have survived by reason of the "saving clause" of the statute, 49 U. S. C. § 22 (1). That conclusion would, of course, follow only if prior to the adoption of the Act there had been a clearly recognized equitable power to enjoin proposed rate changes. This, as we have already indicated, was not the case. Moreover, we have generally rejected such constructions of this and similar saving clauses, see, *e. g.*, *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, *supra*; *T. I. M. E., Inc.*, v. *United States*, 359 U. S. 464, 472–474.

sideration of the question, through its Suspension Board, involves only a brief and informal hearing.[23] Automatic judicial acceptance of a finding reached in that way would delegate greater effect to such an administrative process than the process itself warrants. As the basis for a judicial decree of a single district judge, such a procedure would be inconsistent with § 15 (1) of the Act, which provides that effective rates may be struck down as unlawful after a "full hearing" by the Commission.[24]

## III.

The petitioners contend that in any event injunctive relief is authorized in this case to enforce the National Transportation Policy.[25] They argue that when the rail carriers' rates go into effect the barge line will inevitably

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[23] See *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 750 (D. C. D. Del.). The Commission's regulations and rules contemplate only an informal hearing before the Suspension Board upon a protest, of which no transcript is to be made, although reconsideration may be requested. See 49 CFR §§ 1.42, 1.200; see also 1 Davis, Administrative Law (1958), 441: "Although a hearing cannot be held on the question whether to suspend pending hearing, in many cases hurried conferences are held, which provide substantial safeguard against arbitrary action." The practice of the Civil Aeronautics Board under a virtually identical suspension statute appears to be more formal, 14 CFR § 302.505; see *Air Freight Forwarder Assn.*, 8 C. A. B. 469, 474.

[24] We suggest no lack of congressional power to grant either administrative or judicial authority to extend a suspension period prior to completion of the administrative proceeding. Under other statutes Congress has evinced a clear intention to vest the courts with such power. The National Labor Relations Board, for example, has expressly been authorized to apply to the courts for "appropriate temporary relief or restraining order" pending the Board's decision of an unfair labor practice case. 29 U. S. C. § 160 (j). Cf. *Trans-Pacific Freight Conference* v. *Federal Maritime Board*, 112 U. S. App. D. C. 290, 295, 302 F. 2d 875, 880.

[25] 54 Stat. 899, which has been inserted before Part I of the Interstate Commerce Act.

and immediately be driven out of business, contrary to the paramount concern of the policy for the protection of water carriers threatened by rail competition. Apart from the absence of any decisive showing that the barge line would suffer this misfortune, it is clear that nothing in the National Transportation Policy, enacted many years after the 1927 revision of § 15 (7), indicates that Congress intended to revive a judicial power which we have found was extinguished when the suspension power was vested in the Commission. Cf. *United States* v. *Borden Co.*, 308 U. S. 188, 198–199. Indeed, if anything, the policy reinforces our conclusion. The mandate to achieve a balance between competing forms of transportation is directed not to the courts but to the Commission.[26] It is reasonable to suppose that had Congress felt that balance to be in danger of distortion, it would have addressed itself to our problem directly by enhancing the powers granted the Commission to enforce the policy. Surely Congress would not have meant its silence alone to imply the revival of a judicial remedy the exercise of which might well defeat rather than promote the objectives of the National Transportation Policy.

*Affirmed.*

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

The Court by its action today sounds the death knell for barge transportation on the Tennessee River. The war of extermination between the railroads and barge lines began years ago, and, as Chairman Eastman said in *Petroleum Products From New Orleans, La., Group,*

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[26] *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 87–88; *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411, 416 (D. C. N. D. Ala.), aff'd *per curiam sub nom. State Corporation Comm'n* v. *Arrow Transportation Co.*, 361 U. S. 353.

194 I. C. C. 31, 44 (1933), has been effected "by [the railroads] cutting rates where the [barge] competition existed, to whatever extent was necessary to paralyze it, at the same time maintaining rates at a very high level elsewhere." Indeed, this Court has on many occasions had to protect barge lines from such unlawful practices, even in cases where railroad rate activity has received approval of the Interstate Commerce Commission. See *Dixie Carriers, Inc.*, v. *United States*, 351 U. S. 56 (1956), and *Interstate Commerce Comm'n* v. *Mechling*, 330 U. S. 567 (1947). See also *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (D. C. N. D. Ala. 1959). And just a few months ago there was filed here in No. 746, *Mechling Barge Lines, Inc.*, v. *United States*, another case in which the appellants contend that the same old practices were employed. Although the Court admits that "It cannot be said that the legislative history . . . [of the suspension power of the Commission, § 15 (7)] includes unambiguous evidence of a design to extinguish . . . judicial power . . . ," it nevertheless strips the courts of any power to prevent (1) the collection by the railroads of "rates and charges . . . which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . ." as found by the Interstate Commerce Commission; [1] (2) the frustration of the National Transportation Policy under which Congress has commanded the Commission to preserve each medium of transportation

[1] We note that on January 21, 1963, while the case was pending here, the Division of the Commission which had previously considered the case concluded that some of the rates proposed by Southern were lawful but still found most (88%) of the entire rate package of all of the railroads unlawful. Even this finding, however, is not final, for it is subject to and is in fact pending reconsideration before the full Commission.

against unlawful and destructive practices and to guard against the consequences of discrimination; (3) the complete destruction of competing barge lines as well as gross discrimination against shippers and localities along the Tennessee River. I agree with the United States, which has filed at our suggestion an *amicus curiae* brief, that where "a competing carrier will be destroyed and others will suffer gross discrimination and injury before the administrative proceeding is terminated," the appropriate federal court does have the power to enjoin such an extraordinary injury pending decision of the Commission.

I.

The conclusions below that the proposed rate reductions will likely force the barge line out of business are not disputed. As the District Court found, there was "grave danger that irreparable injury, loss or damage may be inflicted . . . if the proposed rates go into effect" and that petitioners "will have no adequate remedy at law." On its face the rate reduction is but a continuation of the old policy found by Chairman Eastman to paralyze barge operations—activity to which the Court now gives its blessing—by a drastic reduction in the present all-rail rate on multiple-car grain shipments while maintaining the higher rate on the ex-barge traffic. The new rate for the haul from St. Louis to Birmingham, reduced from $8.70 per ton to a mere $3.12, is an example which illustrates the effect of the proposed rate reduction. Arrow's present rate for shipments between those points is $5.48, including expense to Arrow of $2.20 for the 71-mile rail leg from Guntersville, Alabama, to Birmingham and 89¢ for transferring the grain from the barge to the rails at Guntersville, which leaves it only $2.39 for transportation by barge. In order to meet Southern's new rate Arrow would have to reduce by $2.36

its charge allocable to water travel, which would leave it exactly 3¢ per ton for that haul. I note further that the all-rail rate for the St. Louis-Birmingham haul is only 92¢ more than the charge to Arrow for the 71-mile Guntersville-Birmingham rail trip. The result of the effectuation of such drastic reductions is elementary—economic destruction of an important mode of transportation. Still the Court refuses to allow the exercise of an inherent equity power to prevent an unconscionably destructive practice which is damaging not only to Arrow, or to barge lines generally, or to water shippers or river ports, or to industries, but to the public welfare itself—all of this by inference. The Court says "that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes . . . out of harmony with the uniformity of rate *levels* . . . ." That reasoning, in the light of the fact that many of the proposed rates are less than 40% of existing ones, coupled with the findings of the Commission and the District Court as to the probable result of this drastic action, is, with due deference, entirely insupportable.

II.

The Court seems to say that because Congress, by § 15 (7), gave the Commission the power in its discretion to suspend rates for a short period, a power which it never previously had, it *ipso facto* foreclosed the federal courts from exercising a power they had always possessed, *i. e.*, equity jurisdiction to preserve the *status quo* and prevent irreparable injury. The two powers are of an entirely different character. The suspension power granted the Commission under § 15 (7) is primary and is exercised in its discretion while the validity of a proposed rate is under consideration, but it is limited under present law to a period of seven months. No criteria or guidelines are laid down for the Commission, the only prerequisite be-

ing the filing of "a statement in writing of its reasons for such suspension." Hence the Commission has a broad, general discretion to suspend proposed rates for a limited period pending investigation. The court, on the other hand, can act only in compelling circumstances to prevent an irreparable injury and to maintain the *status quo* pending the Commission's decision—an equitable power long recognized as existing in the courts. The exercise of these judicial powers is but in aid of and ancillary to the temporary suspension power of the Commission and supports rather than interferes with the latter's jurisdiction, preventing irreparable injury from resulting while the Commission has the matter under consideration. Indeed, this power should be exercised only in the most exigent circumstances, such as in the present case, where the Commission has found a strong likelihood of irreparable injury resulting from effectuation of proposed rates, has in fact exercised the full measure of its suspension power and now finds itself powerless to prevent those rates from going into effect. I submit that neither the language of § 15 (7) nor its legislative history supports the removal of judicial power to act in such circumstances.

Prior to 1910 the Commission had the power neither to suspend proposed rates nor "to prevent by direct action excessively low rates," *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 566 (1919), and its earliest suspensions of proposed rate reductions occurred subsequent to 1910. See *Suspension of Rates on Packinghouse Products,* 21 I. C. C. 68 (1911); *Board of Trade of Chicago* v. *Illinois Central R. Co.,* 26 I. C. C. 545 (1913). It was not until 1920 that the Commission was given power to exercise direct action and prescribe minimum rates. Transportation Act of 1920, 41 Stat. 484, 49 U. S. C. §15 (1); see *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 525 (1924). At the time of the enactment

of § 15 (7), as the legislative history shows, there was no evident concern with rate decreases and protection of competing carriers, but attention was focused on the protection of shippers from excessive rate increases with which the Commission had ample power to deal, though it could not at that time suspend rates.[2] This omission was noted on the floor of the Senate on the day before the vote was taken on § 15 (7) when Senator Heyburn observed that "Little or no consideration seems to have been given to the advisability of including decreases in rates under the amendment." 45 Cong. Rec. 6792. There is no evidence that complaints as to rate reductions occupied any significant portion of the Commission's docket prior to 1910. Prior to that time the Commission was concerned almost exclusively with shippers' complaints of rate increases. It is hard for me to see, therefore, how it could be said that Congress, when it first enacted the suspension power in 1910, was faced with the problem of the suspension of rate decreases as between competing carriers when there had apparently been very few, if indeed any, such complaints previous to 1910. The Court says that prior to enactment of the suspension power in 1910, "such courts as entertained jurisdiction" in rate cases "were reaching diverse results" and producing "confusion and . . . competitive inequities," but those cases, as far as can be determined, did not involve unjust and destructively low rates. Therefore, while there were, as the Court points out, "[c]onflicts . . . between competing carriers" prior to 1910, there is no indication that

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[2] In 1910 Congress enacted § 4 (2) of the Act, the provisions of which evidence an awareness that railroad rate reductions could be destructive competitive practices, see *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 566–567 (1919), but § 4 (2) clearly does not prohibit such practices. Not until the Transportation Act of 1920, as we have noted, was the Commission given the power to prescribe minimum rates.

any of these cases involved reductions in rates. Finally, a suspension power similar to the "judicial power" which the Court says brought "the whole problem to a head" is now, by statute, exercised by the Commission for a limited period as a matter of primary jurisdiction—a power quite different from that which the District Court was asked to exercise here. A simple grant of jurisdiction to an administrative agency without reference to a long-recognized equity jurisdiction which is not inconsistent therewith is a strange way to dispose of judicial power. See *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962). I attribute no such purblindness to Congress.

It can hardly be said that the granting of this primary jurisdiction with power to suspend for seven months totally ousted the equity courts of their traditional power to grant injunctive relief to preserve the *status quo* and prevent irreparable injury while the case is in progress in another forum. The cases do not support this conclusion where the other forum is either a court of law, *Erhardt* v. *Boaro*, 113 U. S. 537 (1885); *Louisville & N. R. Co.* v. *Western Union Telegraph Co.*, 207 F. 1 (C. A. 6th Cir. 1913), or an administrative agency. *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Bd.*, 112 U. S. App. D. C. 290, 295, 302 F. 2d 875, 880 (1962); *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir. 1950); *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (C. A. 2d Cir. 1948); *Isbrandtsen* v. *United States*, 81 F. Supp. 544 (D. C. S. D. N. Y. 1948). Moreover, whenever Congress wanted to oust the jurisdiction of the courts it not only knew how to do it but did so in no uncertain terms. See, *e. g.*, Internal Revenue Code of 1954, § 7421; Norris-LaGuardia Act, 29 U. S. C. §§ 101–115. In addition to these considerations, I submit that the Interstate Commerce Act itself supports the conclusion that the courts retained their traditional jurisdiction. Section 22 (1)

of the Act, 24 Stat. 387, 49 U. S. C. § 22 (1), provides that no provision of the Act shall "in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The "remedies now existing at common law" include such equitable remedies as injunctions. *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638 (1900).

Finally, in 1940, the Congress adopted the National Transportation Policy (54 Stat. 899, 49 U. S. C. preceding § 1) in which it enjoined the Commission to

> "foster sound economic conditions in transportation and among the several carriers; . . . encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations . . . or unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States . . . . All of the provisions of [the Interstate Commerce Act] shall be administered and enforced with a view to carrying out the above declaration of policy."

The policy of "developing, coordinating, and *preserving* a national transportation system by water, highway, and rail . . . adequate to meet the needs of the commerce of the United States" (emphasis supplied) will be completely thwarted if Arrow and other barge lines on the Tennessee River are forced out of business. It is, indeed, a sad day for our judicial processes when our courts are rendered powerless to prevent this miscarriage of the clear policy of our Government, the frustration of the admitted duties of the Interstate Commerce Commission and the destruction of an entire system of transportation.

In short, this case presents a situation peculiarly appropriate for the exercise of the inherent equity jurisdiction of a federal court to supplement the now-exhausted suspension power of the Commission, consistent with the Commission's conclusion that such suspension is in the public interest and consistent with the affirmative mandate of the Congress in the National Transportation Policy.

In addition, while it would be inappropriate to discuss the constitutional questions raised as to § 15 (7), the opinion of the Court evokes grave doubt about the constitutionality of the statute, as interpreted. See *Porter* v. *Investors Syndicate,* 286 U. S. 461, 470–471 (1932); *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 201, 204–205 (1924)

I dissent.

# INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* CENTRAL AIRLINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 61. Argued February 19–20, 1963.—Decided April 15, 1963.

A suit in a Federal District Court to enforce an award of an airline system board of adjustment, created by a contract between an airline and a labor union pursuant to § 204 of the Railway Labor Act and whose decisions are final and binding upon the parties, arises out of the Railway Labor Act and is governed by federal law. Therefore, it is (1) a suit arising under a law of the United States of which the District Court has jurisdiction under 28 U. S. C. § 1331, if the jurisdictional amount is involved, and (2) a suit arising under a law regulating commerce of which the District Court has jurisdiction under 28 U. S. C. § 1337, irrespective of the amount involved. Pp. 682–696.

295 F. 2d 209, reversed.

*Charles J. Morris* and *Bernard Dunau* argued the cause for petitioners. With them on the briefs was *Plato E. Papps.*

*Luther Hudson* argued the cause and filed a brief for respondent.

*Samuel J. Cohen* filed a brief for the Air Line Pilots Association, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

The respondent airline discharged the six individual petitioners in April 1958 after they refused to attend disciplinary hearings without having a union representative present. The petitioning union and the employees ini-

tiated grievances over these discharges, which were not settled between the parties and which were presented to the system board of adjustment, established by agreement between the union and the airline according to the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. §§ 151–188. The four-man board of adjustment deadlocked, a neutral referee was appointed by the National Mediation Board, and an award was then rendered ordering the individual petitioners reinstated without loss of seniority and with back pay. Central refused to comply and petitioners filed this suit in the United States District Court for the Northern District of Texas for enforcement of the award.

The complaint recited the certification of the union as the collective bargaining agent by the National Mediation Board pursuant to an election held under the Railway Labor Act, disclosed the execution of a collective bargaining contract with the company, and attached as an exhibit a copy of another contract with Central establishing a system board of adjustment. This contract stated, "In compliance with Section 204, Title II of the Railway Labor Act, as amended, there is hereby established a system board of adjustment for the purpose of adjusting and deciding disputes . . . ." Under the express terms of the contract, "decisions of the Board in all cases properly referable to it shall be final and binding upon the parties" and, when a neutral referee is sitting with the board, "a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute." The complaint set out in some detail the action and decision of the system board and a copy of its award was attached. Alleging that Central had refused to comply with the terms of the award and that the suit "arises under the laws of the United States, specifically

under the Railway Labor Act as set out more particularly hereinabove," petitioners requested the "enforcement of the aforesaid System Board Award . . . and that judgment be entered ordering defendant to comply with said award . . . ."

Although the gist of the complaint was that Central was obliged to comply with the award by reason of the Railway Labor Act, the District Court granted Central's motion to dismiss for lack of jurisdiction, concluding that there was no diversity of citizenship (which was not disputed) and that the case did not arise under the laws of the United States as required by 28 U. S. C. § 1331.[1] The Court of Appeals for the Fifth Circuit affirmed on the authority of its previous decision in *Metcalf* v. *National Airlines*, 271 F. 2d 817, ruling that the complaint did not disclose "affirmatively a federally-created cause of action" and that "this suit is nothing more than a state-created action to construe a contract." 295 F. 2d 209. Certiorari was granted to consider the important question of whether a suit to enforce an award of an airline system board of adjustment is a suit arising under the laws of the United States under 28 U. S. C. § 1331 or a suit arising under a law regulating commerce under 28 U. S. C.

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[1] 28 U. S. C. § 1331:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

§ 1337.[2] 369 U. S. 802. We have concluded that this question must be answered in the affirmative and that the District Court has jurisdiction to proceed with the suit.

I.

In 1936, Congress extended the Railway Labor Act to cover the then small-but-growing air transportation industry. 49 Stat. 1189, 45 U. S. C. §§ 181–188. Its general aim was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry.[3] But there was to be a significant variation. The 1936 amendments made applicable to the airlines all of the provisions of the Railway Labor Act, excepting § 3, 45 U. S. C. § 153, dealing with the National Railroad Adjustment Board; but including § 1, 45 U. S. C. § 151, containing definitions; § 2, 45 U. S. C. § 151a, the Act's statement of purposes; §§ 4 and 5, 45 U. S. C. §§ 154–155, relative to the National Mediation Board and its functions; and §§ 7, 8 and 9, 45 U. S. C. §§ 157–159, relating to voluntary arbitration and emergency boards. § 202, 45 U. S. C. § 182. In the place of § 3, Congress provided in § 205, 45 U. S. C. § 185, that the creation of a National Air Transport Board would

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[2] 28 U. S. C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Petitioners' complaint mentioned only § 1331, but reliance has subsequently been placed on § 1337 as well, since there is a dispute concerning the existence of the jurisdictional amount required by § 1331. This is permissible. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 589–591.

[3] See Hearings on S. 2496 before a Subcommittee of the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 26–27.

be postponed until "in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment . . . ." Until the establishment of the national board for the airlines industry, § 204, 45 U. S. C. § 184, required the formation of system, group, or regional boards of adjustment:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181–188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

The duty imposed upon the parties to create adjustment boards to settle grievances was more than a casual suggestion to the air industry. The original version of S. 2496, which, as amended, became law, provided for voluntary boards of adjustment as in the case of the railroads and extended the jurisdiction of the National Mediation Board to minor as well as major disputes.[4] But upon the suggestion of the National Mediation Board, its jurisdiction was not expanded, and the law as finally passed made compulsory the establishment of the adjustment boards.[5] Until and unless the National Mediation Board determined to create a national board, the parties were placed under the statutory duty of establishing and utilizing system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes arising under existing contracts.

The obligation which § 204 fastened upon the carriers and their employees cannot be read in isolation. Its true significance must be drawn from its context as part of the

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[4] *Id.*, at 1–2.

[5] *Id.*, at 11.

Railway Labor Act which itself draws meaning from its history.[6] See *Romero* v. *International Term. Co.*, 358 U. S. 354, 360.

Congress has long concerned itself [7] with minimizing interruptions in the Nation's transportation services by strikes and labor disputes and has made successive attempts to establish effective machinery to resolve disputes not only as to wages, hours, and working conditions, the so-called major disputes connected with a negotiation of contracts or alterations in them, but also as to the interpretation and application of existing contracts, the minor disputes of the type involved in this case. In 1920,[8] the latter category was dealt with by providing that the parties "may" create boards of adjustment to handle these grievances which, however, if unresolved by these boards were to be referred to the Railway Labor Board whose decisions were not legally enforceable.[9] The results were highly unsatisfactory,[10] and in 1926 Congress required that "boards of adjustment shall be created by agreement." [11] The boards were to be composed of an equal number of employee and employer representatives and

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[6] See generally *Virginian R. Co.* v. *System Federation*, 300 U. S. 515; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; Garrison, The National Railroad Adjustment Board, 46 Yale L. J. 567; Note, 72 Yale L. J. 803.

[7] The Court has many times reviewed the history of the railway labor laws. For example, see *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Brotherhood of Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30; *Union Pac. R. Co.* v. *Price*, 360 U. S. 601; *Machinists* v. *Street*, 367 U. S. 740.

[8] 41 Stat. 469, 474.

[9] *Pennsylvania Federation* v. *Pennsylvania R. Co.*, 267 U. S. 203. See *Pennsylvania R. Co.* v. *Labor Board*, 261 U. S. 72.

[10] See *Brotherhood of Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30.

[11] 44 Stat. 578.

their decisions were to "be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions." [12]

In spite of the mandate of the 1926 Act, creation of adjustment boards did not automatically follow. Furthermore, there was no provision in the Act for breaking deadlocks of the board, which were frequent and which resulted in a myriad of minor disputes going unresolved. As a result, see *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 725–726, in 1934 the Act was amended to create the National Railroad Adjustment Board, the divisions of which were to hear disputes referred by either party and "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." § 3, 45 U. S. C. § 153 First (i). In the event of deadlocks in a division, the National Mediation Board was required to name a neutral referee to sit with the appropriate division of the Board to determine the case. § 3 First (l). It was provided in § 3 First (m) that "the awards of the several divisions of the Adjustment Board shall be stated in writing . . . and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. . . ." Section 3 First (p) provided for a suit in the United States District Courts to enforce certain awards.

While thus establishing a National Adjustment Board with power to make final awards with the help of neutral persons where necessary, Congress also provided in § 3 Second for voluntary system boards:

> "Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees,

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[12] § 3 First (e), *id.,* at 579.

all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board." 45 U. S. C. § 153 Second.

This machinery was designed to serve the stated purposes of the Act which were, among others: "To avoid any interruption to commerce or to the operation of any carrier engaged therein" and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." § 2, 45 U. S. C. § 151a. Implementing such goals, § 2 First, 45 U. S. C. § 152 First, made it "the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce." The statute directed that minor disputes be handled on the property in the usual manner, but failing adjustment either party could take the matter to the adjustment board, which was to hear and decide it. This provision is applicable both to rail (§ 3 Second) and air (§ 204) carriers.

## II.

In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady congressional

intent to move toward a reliable and effective system for the settlement of grievances, we believe Congress intended no hiatus in the statutory scheme when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards. Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Instead, it intended the statutory command to be legally enforceable in the courts and the boards to be organized and operated consistent with the purposes of the Act.

We have held other duties imposed upon the carriers and their employees by the Railway Labor Act binding and their breach redressable in the federal courts, such as the duty to bargain, *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 545, and the duty of a certified bargaining representative to represent all members of the craft without discrimination, *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192.[13] We take a similar view of the duty to establish adjustment boards under § 204; and as the Court said in *Tunstall* v. *Brotherhood of Locomotive Enginemen,* 323 U. S. 210, 213, quoting from *Deitrick* v. *Greaney,* 309 U. S. 190, 200–201, "the extent and nature of the legal consequences" of this duty "though left by the statute to judicial determination, are nevertheless to

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[13] The absence of a specific statute conferring jurisdiction, in addition to §§ 1331 and 1337, was of no moment in such cases. See *Tunstall* v. *Brotherhood of Locomotive Enginemen,* 323 U. S. 210, 213; *Leedom* v. *Kyne,* 358 U. S. 184, 189–190. These cases, and the one at bar, are unlike such cases as *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, and *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323, where Congress intended no judicial review and its denial impaired no federal rights.

be derived from it and the federal policy which it has adopted." [14]

It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.[15] The

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[14] See also *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *General Committee* v. *Southern Pac. Co.,* 320 U. S. 338; *Brotherhood of Clerks* v. *United Transport Service Employees,* 320 U. S. 715, 816; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515.

[15] As the dissenting judge below remarked, 295 F. 2d, at 221–222: ". . . Congress in 1936 could not . . . have thought that stability and continuity to interstate air commerce would come from the undulating policies . . . of the legislatures and courts (or both) of 48 states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration." The dissenting opinion also points out the difficult conflict of laws problems which applying state law would raise, 295 F. 2d, at 223:

"Not the least of the absurdities is that an airplane flies from state to state. What state is to be the forum? What state was the parent of this creature—the consensual contract containing the agreement to arbitrate? May any or all of the states beneath the route or routes traveled by the airline be resorted to? Is the continuity of essential air traffic to be at the plaintiff's choice of forum? What is to happen when several plaintiffs bring several suits in several

needs of the subject matter manifestly call for uniformity.[16] Compare *Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, 103–104.

The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of congressional sanction: "[T]he federal statute is the source of the power and authority . . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction. . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . . ." *Railway Dept.* v. *Hanson*, 351 U. S. 225, 232. That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. The situation presented here is analogous to that in *American Surety Co.* v. *Shulz*, 237 U. S. 159, a suit on a supersedeas bond in an appeal from a District Court to the Court of Appeals. When the judgment against the appellant was affirmed and he failed to pay it, the appellee sued the surety in the District Court. This Court held that there was "arising under" jurisdiction, since the bond had been given pursuant to the federal statute requiring one when appeals

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states? Is effective federal control of an operational activity deemed so essential to national welfare to be precariously dependent upon the accident of diversity of citizenship?"

[16] To be sure, different airlines may use different contracts, and any one may have different agreements for different crafts, but such lack of uniformity represents a minimal burden on commerce. The lack of uniformity created by dividing everything by 50 (or however many States the system spans) would multiply the burden by a substantial factor and aggravate the problem to an intolerable degree.

were taken; the construction of the bond and the extent of the surety company's liability under it were said to be federal questions which the federal courts had jurisdiction to determine.[17]

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[17] The *Shulz* case followed a line of authority involving suits on bonds given by federal officers to ensure their faithful performance of their federal duties, in which the Court had held that there was federal jurisdiction for suits by an aggrieved party seeking to collect from the surety. *Bock* v. *Perkins*, 139 U. S. 628 (suit for tort of U. S. marshal committed in performance of duty); *Sonnentheil* v. *Moerlein Co.*, 172 U. S. 401 (same); see *Feibelman* v. *Packard*, 109 U. S. 421 (same, removal case); *Howard* v. *United States*, 184 U. S. 676 (suit against surety of clerk of court brought *ex rel.* United States to recover for clerk's appropriation of money paid into federal court). The same rule that federal law applies to federal contracts has been applied, in a choice of substantive law rather than jurisdictional context, in cases involving rights and obligations arising on commercial paper issued by the United States. See, *e. g.*, *Metropolitan Bank* v. *United States*, 323 U. S. 454; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366. See also *Royal Indem. Co.* v. *United States*, 313 U. S. 289, 296 (general law rather than local law governs whether Government may collect interest on surety bond given to secure collection of taxes); *American Pipe & Steel Corp.* v. *Firestone Co.*, 292 F. 2d 640, 643–644 (C. A. 9th Cir.) (construction of subcontract governed by federal law in suit between prime and sub on government contract); *Girard Trust Co.* v. *United States*, 149 F. 2d 872 (C. A. 3d Cir.) (federal law governs rights of parties in lease where Government is lessee, Tucker Act suit); *Woodward* v. *United States*, 167 F. 2d 774 (C. A. 8th Cir.) (federal law governs interpretation of National Service Life Insurance policy, suit against Government on policy). Although these decisions did not involve federal jurisdiction as such, since jurisdiction was conferred by specific statutes and recourse to the "arising under" statute was unnecessary, they are suggestive since they hold federal law determinative of the merits of the claim. Also highly suggestive, for the same reason, is this Court's language in *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173, 176, a case involving both federal patent-antitrust policies and conflicting state contract law policies of estoppel:

"[T]he doctrine of that case [*Erie*] is inapplicable to those areas of judicial decision within which the policy of the law is so domi-

More specifically, the provisions of a § 204 contract, such as those governing the composition of the adjustment board, the procedures to be employed as to notice and hearing or for breaking deadlocks, or the finality to be accorded board awards, are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme.[18] There may be, for example, any number of provisions with regard to the finality of an award that would satisfy the requirements of § 204 but we are quite sure that *some* such provision is requisite to a § 204 contract and that the federal law would look with favor upon contractual provisions affording *some* degree of finality to system board awards. Congress has long since abandoned the approach of the completely unenforceable award which was used in the 1920 Act. *Elgin, J. & E. R. Co.* v. *Burley, supra.* Adjustment board decisions were expressly made final and binding in

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nated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law."

[18] Thus in cases involving adjustment board procedures or awards, the federal courts have applied federal substantive law to the determination of the validity of the award and the procedures for securing it, irrespective of whether the case was brought into the federal court system on the basis of diversity. See *International Assn. of Machinists* v. *Northwest Airlines,* 304 F. 2d 206 (C. A. 8th Cir.); *Flight Engineers* v. *American Airlines,* 303 F. 2d 5 (C. A. 5th Cir.); *Woolley* v. *Eastern Air Lines,* 250 F. 2d 86, 90–91 (C. A. 5th Cir.); *Sigfred* v. *Pan American World Airways,* 230 F. 2d 13 (C. A. 5th Cir.); *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 625–627 (C. A. 3d Cir.); *Pan American World Airways, Inc.,* v. *Division of Labor Law Enforcement,* 203 F. Supp. 324 (N. D. Cal.); *Edwards* v. *Capital Airlines,* 84 U. S. App. D. C. 346, 176 F. 2d 755; *Crusen* v. *United Air Lines,* 141 F. Supp. 347 (D. Colo.), aff'd, *per curiam,* 239 F. 2d 863 (C. A. 10th Cir.); *Farris* v. *Alaska Airlines,* 113 F. Supp. 907 (W. D. Wash.); *American Airlines* v. *Air Line Pilots Assn.,* 91 F. Supp. 629 (E. D. N. Y.); *United Automobile Workers* v. *Delta Air Lines,* 83 F. Supp. 63 (N. D. Ga.).

the 1926 Act, the National Railroad Adjustment Board awards were made enforceable in the federal courts by the 1934 amendments, and the awards under voluntary arbitration agreements were likewise made expressly enforceable by the statute. There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts or that it contemplated awards by adjustment boards the enforceability of which depended entirely upon the desires of the parties or upon state statutes or court decisions. Quite the contrary, the Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it "intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice." *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 626 (C. A. 3d Cir.); *Washington Term. Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 10, 124 F. 2d 235, 244.

## III.

The contract of the parties here was executed under § 204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance.

In the circumstances we have here, we are not dealing with a suit involving an aspect of federal law which is only collateral or remote or a case where state and federal

laws are so blended as to present a serious question of the scope of the arising-under provision of § 1331 or § 1337. See *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *Gully* v. *First Nat. Bank*, 299 U. S. 109; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667; *Romero* v. *International Term. Co.*, 358 U. S. 354, 393, n. 4 (dissenting and concurring opinion). In our view the complaint in this case, for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 U. S. C. § 1331 if the jurisdictional amount is satisfied and in any case under § 1337. *Romero* v. *International Term. Co.*, 358 U. S. 354; *Montana-Dakota Co.* v. *Northwestern P. S. Co.*, 341 U. S. 246, 249; *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260.[19]

*Reversed and remanded.*

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[19] See also *Brotherhood of Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, brought under 28 U. S. C. §§ 1331, 1337. (R. 4, 47.)

# DIXILYN DRILLING CORP. *v.* CRESCENT TOWING & SALVAGE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 297. Argued March 21, 1963.—Decided April 15, 1963.

The holding of *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, and *Boston Metals Co.* v. *The Winding Gulf*, 349 U. S. 122, that a towboat owner may not validly contract against liability for its own negligence is reaffirmed. Pp. 697–698.

303 F. 2d 237, reversed.

*E. D. Vickery* argued the cause for petitioner. With her on the briefs was *Wilbur H. Hecht.*

*Charles Kohlmeyer, Jr.* argued the cause for respondent. With him on the brief was *George B. Matthews.*

PER CURIAM.

Respondent Crescent Towing Company contracted with petitioner Dixilyn Drilling Corporation to tow Dixilyn's barge *Julie Ann* down the Mississippi River. While being towed, the barge collided with a bridge, and the bridge owners filed a libel in the United States District Court claiming damages from the tower and the barge owner. These two jointly paid the claim but continued to litigate, as between themselves, the question of which was liable. The district judge after a full trial found that the collision and the resulting damage were due solely to the negligence of the tower. He also rejected the tower's argument that regardless of which was negligent the barge owner should pay the damages because it had contracted to assume liability for all damages arising out of the towage including "any damage claims urged by third parties." The judge held that the barge owner had not agreed to assume liability for damages caused by the tower's own negligence. On review the Court of Appeals

held that it need not decide the "extremely difficult" factual question of who was negligent because, in the court's view, the barge owner had agreed in the towage contract to assume liability for all losses arising out of the towage, including those caused by the tower's negligence. Holding such a contract to be valid, the Court of Appeals reversed the District Court's judgment.

In treating as valid a contract which exempts the tower from liability for its own negligence, the Court of Appeals' holding is squarely in conflict with our holding in *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955), and *Boston Metals Co.* v. *The Winding Gulf*, 349 U. S. 122 (1955). The Court of Appeals thought that the present case was distinguishable because the peculiar hazards of towage and other factors brought it within the ambit of *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411 (1959). But *Southwestern Sugar* is not applicable here, for in that case the Court merely preferred to give the Interstate Commerce Commission an opportunity to rule on an exculpatory clause which was part of a tariff filed with the Commission. We adhere to the rule laid down in *Bisso* and *Winding Gulf* and hold that the Court of Appeals was in error in failing to follow it. The judgment is reversed and the cause remanded to that court to consider other questions.

*Reversed and remanded.*

MR. JUSTICE HARLAN, concurring.

While I would prefer to see *Bisso* reconsidered, believing, with deference, that it was wrongly decided, I nevertheless join the opinion of the Court. Certainty in the law governing commercial transactions of this kind is an overriding consideration which would not be promoted by opening the *Bisso* rule to indeterminate exceptions in instances where, unlike *Southwestern Sugar*, no functions of a regulatory agency are involved.

## BASHAM *v.* PENNSYLVANIA RAILROAD CO.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 512. Argued March 19, 1963.—Decided April 15, 1963.

In this suit in a state court under the Federal Employers' Liability Act by a car repairman to recover damages for personal injuries allegedly sustained as a result of the railroad's negligence, there was evidence sufficient to support the jury's verdict for the plaintiff, and it was error for the trial court to set aside the jury's verdict. Pp. 699–701.

11 N. Y. 2d 991, 183 N. E. 2d 704, reversed.

*Ira Gammerman* argued the cause and filed a brief for petitioner.

*David J. Mountan, Jr.* argued the cause and filed a brief for respondent.

PER CURIAM.

Petitioner, a car repairman employed by respondent railroad, brought this suit under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, in the Supreme Court of the State of New York to recover damages for personal injuries sustained as a result of respondent's alleged negligence. A jury verdict for petitioner was set aside by the trial judge on the ground that negligence was not established. The Appellate Division affirmed without opinion, one judge dissenting, 10 App. Div. 2d 948, 201 N. Y. S. 2d 362, and the Court of Appeals affirmed, also without opinion, 11 N. Y. 2d 991, 183 N. E. 2d 704. This Court granted certiorari, 371 U. S. 860, to consider the propriety of the trial judge's action.

At the time of the accident, petitioner was working on a hoist platform located in a work pit underneath a railroad car on which new wheels were being installed. He testified that as he was lifting a 100-pound wheel spring

into position the platform moved, causing him to drop the spring on his left index finger which, as a consequence, was amputated. Petitioner's version of the accident was confirmed by a co-worker who testified that he saw the platform move at the time of the injury. Petitioner offered additional evidence that prior complaints had been lodged with respondent about platform movements in similar and adjacent repair pits in which fellow employees were working and that safety equipment preventing platform movements had been installed in one of the adjacent pits but not in the pit where the accident occurred.

Respondent introduced evidence that it was physically impossible for the accident to have happened in the manner claimed by petitioner, that the platform was virtually immovable, and that the equipment installed in the adjacent pit was put there to assure that the platform was in position when the men went to work and had nothing to do with the movement of the platform during the process of installing new wheels.

The conflict in the testimony was resolved by the jury's verdict in favor of the petitioner. Since there was an evidentiary basis for that verdict, it was error for the New York trial and appellate courts to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury.

In *Lavender* v. *Kurn*, 327 U. S. 645, also an F. E. L. A. action, the employer argued, as does respondent here, that its evidence tended to show it was physically impossible for its equipment to have injured the employee. There, as in this case, the suing employee offered evidence that the injury was the result of equipment failure. In reversing a state court judgment setting aside a jury verdict for the employee, this Court said, in language fully apposite here: "Only when there is a complete absence of probative facts to support the conclusion reached [by the

jury] does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U. S., at 653.

Since, in this case, petitioner's evidence, though disputed, constituted probative facts sufficient to support the finding of negligence, the state courts improperly invaded the function and province of the jury in setting the verdict aside. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.

The judgment of the New York Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE HARLAN, dissenting.

This is a run-of-the-mill negligence case, presenting no new question of law or departure from established legal principles. The only question is whether there was enough evidence to take the case to the jury.

A total of 12 New York Judges—one at *nisi prius*, four on the Appellate Division (a fifth dissenting), and seven on the Court of Appeals—have held that the evidence was not sufficient to warrant submission of the case to the jury.

To bring such a case here for further review by nine more Justices seems to me a most futile expenditure of judicial time. Having reflected on the oral argument, briefs, and record, I conclude that the only premise on which this reversal can be justified is that anything a jury says goes.

I would affirm the judgment below.

## LESTER C. NEWTON TRUCKING CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

No. 768. Decided April 15, 1963.

209 F. Supp. 600, affirmed.

*H. Charles Ephraim* for appellants.

*Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, Robert W. Ginnane* and *Fritz R. Kahn* for the United States and the Interstate Commerce Commission; *R. Edwin Brady, Harry J. Breithaupt, Jr., T. Randolph Buck, Carl Helmetag, Jr., James G. Lane* and *J. Edgar McDonald* for the Association of American Railroads et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

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## JOHNSON *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 853. Decided April 15, 1963.

Appeal dismissed and certiorari denied.
Reported below: — Miss. —, 145 So. 2d 156.

*E. H. Cunningham, Jr.* for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

## JOHNSON ET UX. *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 781. Decided April 15, 1963.

Appeal dismissed and certiorari denied.

Reported below: 203 Cal. App. 2d 712, 22 Cal. Rptr. 149.

*Leslie W. Irving* and *Scott D. Kellogg* for appellants.

*Stanley Mosk*, Attorney General of California, *Howard S. Goldin*, Assistant Attorney General, and *N. B. Peek* and *Warren J. Abbott*, Deputy Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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## KARPEL *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 809. Decided April 15, 1963.

Appeal dismissed for want of a substantial federal question.

*Morris Lavine* for appellant.

*Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

## SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DIST. *v.* CITY OF MESA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 803. Decided April 15, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 92 Ariz. 91, 373 P. 2d 722.

*William R. Meagher* for appellant.

*J. La Mar Shelley, Charles S. Rhyne, Brice W. Rhyne* and *Alfred J. Tighe, Jr.* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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## DANIELS *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

No. 814. Decided April 15, 1963.

210 F. Supp. 942, affirmed.

*John W. Bonner* for appellant.

*Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane* and *Arthur J. Cerra* for the United States and the Interstate Commerce Commission; *Newell Gough, Jr.* and *Edwin S. Booth* for Great Northern Railway Co., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

## MEYERKORTH ET AL. *v.* NEBRASKA ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 827. Decided April 15, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 173 Neb. 889, 115 N. W. 2d 585.

*James N. Ackerman* for appellants.

*Clarence A. H. Meyer,* Attorney General of Nebraska, and *Melvin K. Kammerlohr,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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## JOHNSON *v.* DOWD, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 1, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 241 Ind. 702, 170 N. E. 2d 55.

Petitioner *pro se.*

*Edwin K. Steers,* Attorney General of Indiana, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Lane* v. *Brown,* 372 U. S. 477.

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## CRAIG *v.* INDIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 17, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Edwin K. Steers,* Attorney General of Indiana, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Lane* v. *Brown,* 372 U. S. 477.

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## BARBER *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 134, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Griffin* v. *Illinois,* 351 U. S. 12, and *Douglas* v. *California,* 372 U. S. 353.

## THOMPSON *v.* INDIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 4, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Edwin K. Steers,* Attorney General of Indiana, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Lane* v. *Brown,* 372 U. S. 477.

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## HOLLOMAN *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 444, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

## LUCKMAN *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 63, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Stanley Mosk,* Attorney General of California, and *Robert R. Granucci* and *John S. McInerny,* Deputy Attorneys General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their opinions in *Douglas* v. *California,* 372 U. S., at 358, 360.

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## PUNTARI *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 718, Misc. Decided April 15, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

## COLLINS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 599, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 203 Cal. App. 2d 611, 21 Cal. Rptr. 783.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California*, 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their opinions in *Douglas* v. *California*, 372 U. S., at 358, 360.

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## FUQUA *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 854. Decided April 15, 1963.

Appeal dismissed and certiorari denied.
Reported below: — Miss. —, 145 So. 2d 152.

*E. H. Cunningham, Jr.* for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

## HOLMES *v.* CALIFORNIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 70, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 197 Cal. App. 2d 699, 17 Cal. Rptr. 599.

Petitioner *pro se*.

*Stanley Mosk*, Attorney General of California, and *William E. James*, Assistant Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California*, 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their opinions in *Douglas* v. *California*, 372 U. S., at 358, 360.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

## SYMONS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 301, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 201 Cal. App. 2d 825, 20 Cal. Rptr. 400.

Petitioner *pro se*.

*Stanley Mosk*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Calvin W. Torrance*, Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California*, 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their opinions in *Douglas* v. *California*, 372 U. S., at 358, 360.

## TUCKER *v.* INDIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 360, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se*.

*Edwin K. Steers*, Attorney General of Indiana, and *Donald L. Adams*, Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Lane* v. *Brown*, 372 U. S. 477.

## WILLIAMS *v.* CALIFORNIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 534, Misc. Decided April 15, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se*.

*Stanley Mosk*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Raymond M. Momboisse*, Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California*, 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their opinions in *Douglas* v. *California*, 372 U. S., at 358, 360.

# COLORADO ANTI-DISCRIMINATION COMMISSION ET AL. *v.* CONTINENTAL AIR LINES, INC.

CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 146. Argued March 28, 1963.—Decided April 22, 1963.*

After administrative hearings, the Colorado Anti-Discrimination Commission found that respondent, an interstate air carrier with headquarters in Colorado, had, within that State, rejected the application of a Negro for a job as a pilot solely because of his race and that this was an unfair employment practice prohibited by the Colorado Anti-Discrimination Act of 1957, and it ordered respondent to cease and desist from such discriminatory practices and to give the complainant the first opportunity to enroll in its training school in its next course. On review, a state court held that the Act could not constitutionally be applied to the flight crew of an interstate air carrier, and it set aside the Commission's findings and dismissed the complaint. The Supreme Court of Colorado affirmed. *Held:* The judgment is reversed and the cause is remanded for further proceedings. Pp. 716–725.

(a) The judgment below does not rest upon an independent and adequate state ground but upon the State Supreme Court's application and interpretation of the Federal Constitution, federal statutes and Executive Orders, and this Court has jurisdiction on certiorari. P. 718.

(b) Colorado's requirement that respondent refrain from racial discrimination in its hiring of pilots in that State does not unduly burden interstate commerce. *Hall* v. *DeCuir*, 95 U. S. 485, and *Morgan* v. *Virginia*, 328 U. S. 373, distinguished. Pp. 718–722.

(c) This field has not been so pervasively covered or preempted by the Civil Aeronautics Act of 1938, now the Federal Aviation Act of 1958, the Railway Labor Act or Executive Orders as to prevent Colorado from applying its Anti-Discrimination Act to respondent, as it did here. Pp. 722–725.

149 Colo. 259, 368 P. 2d 970, reversed.

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*Together with No. 492, *Green* v. *Continental Air Lines, Inc.*, on certiorari to the same Court.

*T. Raber Taylor* and *Floyd B. Engeman,* Assistant Attorney General of Colorado, argued the cause and filed briefs for petitioners. With *Mr. Engeman* on the brief for petitioners in No. 146 was *Duke W. Dunbar,* Attorney General of Colorado.

*Patrick M. Westfeldt* argued the cause for respondent. With him on the brief was *William Cant McClearn.*

By special leave of Court, *Howard H. Jewel,* Assistant Attorney General of California, argued the cause for the State of California, as *amicus curiae* in No. 146, urging reversal. With him on a brief for the States of California and Missouri, as *amici curiae,* were *Stanley Mosk,* Attorney General of California, *Thomas F. Eagleton,* Attorney General of Missouri, *Victor D. Sonenberg,* Deputy Attorney General of California, *James J. Murphy,* Assistant Attorney General of Missouri, and *Charles E. Wilson.*

By special leave of Court, *Shirley Adelson Siegel,* Assistant Attorney General of New York, argued the cause for the State of New York, as *amicus curiae* in No. 146, urging reversal. With her on the brief were *Louis J. Lefkowitz,* Attorney General, *Paxton Blair,* Solicitor General, and *Samuel A. Hirshowitz* and *George D. Zuckerman,* Assistant Attorneys General of New York, *George N. Hayes,* Attorney General of Alaska, *William G. Clark,* Attorney General of Illinois, *Edwin K. Steers,* Attorney General of Indiana, *William M. Ferguson,* Attorney General of Kansas, *Edward J. McCormack, Jr.,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Walter F. Mondale,* Attorney General of Minnesota, *Thomas F. Eagleton,* Attorney General of Missouri, *Arthur J. Sills,* Attorney General of New Jersey, *Mark McElroy,* Attorney General of Ohio, *Robert Y. Thornton,* Attorney General of Oregon, *David Stahl,* Attorney General of Pennsylvania, *J. Joseph*

*Nugent,* Attorney General of Rhode Island, *John J. O'Connell,* Attorney General of Washington, and *George Thompson,* Attorney General of Wisconsin.

Briefs of *amici curiae,* urging reversal in Nos. 146 and 492, were filed by *Solicitor General Cox, Assistant Attorney General Marshall, Bruce J. Terris, Harold H. Greene* and *David Rubin* for the United States; and by *Gilbert Goldstein, Arnold Forster, Charles Rosenbaum, Edwin J. Lukas, Paul Hartman, Theodore Leskes* and *Sol Rabkin* for the Anti-Defamation League of B'nai B'rith et al. Brief of *amici curiae,* urging reversal in No. 146, was filed by *Joseph B. Robison, Melvin L. Wulf* and *Jack Greenberg* for the American Jewish Congress et al. Brief of *amicus curiae,* urging reversal in No. 492, was filed by *Quentin Oscar Ogren* for the Catholic Council on Civil Liberties.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner Marlon D. Green, a Negro, applied for a job as a pilot with respondent Continental Air Lines, Inc., an interstate air carrier. His application was submitted at Continental's headquarters in Denver, Colorado, and was later considered and rejected there. Green then made complaint to the Colorado Anti-Discrimination Commission that Continental had refused to hire him because he was a Negro. The Colorado Anti-Discrimination Act of 1957 provides that it is an unfair employment practice for an employer "to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry." [1] After investigation and efforts at conciliation, the Commission held

[1] Colo. Rev. Stat. Ann. (Supp. 1960) § 80-24-6.

extensive hearings and found as a fact "that the only reason that the Complainant was not selected for the training school was because of his race." [2] The Commission ordered Continental to cease and desist from such discriminatory practices and to "give to the Complainant the first opportunity to enroll in its training school in its next course . . . ." On review the District Court in and for the City and County of Denver set aside the Commission's findings and dismissed Green's complaint. It held that the Anti-Discrimination Act could not "constitutionally be extended to cover the flight crew personnel of an interstate air carrier" because it would impose an undue burden upon commerce in violation of Art. I, § 8, cl. 3, of the United States Constitution, which gives Congress power "To regulate Commerce . . . among the several States . . . ," and because the field of law concerning racial discrimination in the interstate operation of carriers is preempted by the Railway Labor Act,[3] the Civil Aeronautics Act of 1938,[4] and Federal Executive Orders. The Supreme Court of Colorado affirmed the judgment of dismissal but discussed only the question of whether the Act as applied placed an undue burden on commerce, concluding that it did. 149 Colo. 259, 368 P. 2d 970 (1962). The obvious importance of even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities prompted us to grant certiorari. 371 U. S. 809 (1962).

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[2] The Commission also found that Continental was "guilty of a discriminatory and unfair employment practice in requiring on its application form, the racial identity of the applicant and the requirement of a photo to be attached to the application," contrary to the Commission's regulation.

[3] 44 Stat. 577, as amended, 45 U. S. C. §§ 151–188.

[4] 52 Stat. 973, as amended, 49 U. S. C. (1952 ed.) §§ 401–722, now Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. §§ 1301–1542.

*First.* Continental argues that the State Supreme Court decision rested on an independent and adequate nonfederal ground. For that argument, it relies on the trial court's statement "that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" and the statement of the Supreme Court of Colorado that:

> "The only question resolved was that of jurisdiction. The trial court determined that the Act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground." 149 Colo., at 265, 368 P. 2d, at 973.

We reject this contention. The trial court itself did not rest on this ground. Instead, it clearly and unequivocally stated that the case presented a constitutional question of whether the Act could legally be applied to interstate operations. Nor did the Supreme Court of Colorado rely on this ground. It interpreted the trial court's opinion as having held that the Act was invalid insofar as it regulated interstate air carriers. The Court further stated that the question was whether the Act could be applied to interstate carriers, which it answered by concluding that under the Federal Constitution the State Legislature had no power to deal with such matters. We are satisfied that the courts below rested their judgments on their interpretation of the United States Constitution and the preemptive effect of federal statutes and Executive Orders.

*Second.* In holding that the Colorado statute imposed an undue burden on commerce, the State Supreme Court relied on the principle, first stated in *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. 299, that States have no power to act in those areas of interstate commerce which by their nature require uniformity of regulation, even though Congress has not legislated on the

subject.[5] The State Court read two prior decisions of this Court, *Hall* v. *DeCuir,* 95 U. S. 485 (1878), and *Morgan* v. *Virginia,* 328 U. S. 373 (1946), as having established that the field of racial discrimination by an interstate carrier must be free from diverse state regulation and governed uniformly, if at all, by Congress. We do not believe those cases stated so encompassing a rule. The line separating the powers of a State from the exclusive power of Congress is not always distinctly marked; courts must examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers. This was emphatically pointed out in *Hall* v. *DeCuir, supra,* the very case upon which Continental chiefly relies:

> "Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." 95 U. S., at 488.

The circumstances in *Hall* v. *DeCuir* were that a Louisiana law forbidding carriers to discriminate on account of race or color had been applied so as to hold a steamboat owner liable for damages for assigning a colored passenger to one cabin rather than another. This was held to violate the Commerce Clause, but only after a careful analysis of the effects of the law on that carrier and its

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[5] It is not claimed in this case that the Colorado Act discriminated against interstate commerce, see, *e. g., Best & Co.* v. *Maxwell,* 311 U. S. 454 (1940), or that it places a substantial economic burden on Continental, see, *e. g., Bibb* v. *Navajo Freight Lines,* 359 U. S. 520 (1959).

passengers. Among other things, the Court pointed out that if each of the 10 States bordering the Mississippi River were free to regulate the carrier and to provide for its own passengers and freight, the resulting confusion would produce great inconvenience and unnecessary hardships. The Court concluded that:

> "Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business . . . ." 95 U. S., at 489.

After the same kind of analysis, the Court in *Morgan* v. *Virginia, supra,* held that a Virginia law requiring segregation of motor carrier passengers, including those on interstate journeys, infringed the Commerce Clause because uniform regulation was essential. The Court emphasized the restriction on the passengers' freedom to choose accommodations and the inconvenience of constantly requiring passengers to shift seats. As in *Hall* v. *DeCuir,* the Court explicitly recognized the absence of any one, sure test for deciding these burden-on-commerce cases. It concluded, however, that the circumstances before it showed that there would be a practical interference with carrier transportation if diverse state laws were permitted to stand. The importance of a particularized inquiry into the existence of a burden on commerce is again illustrated by *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28 (1948), where the Court had before it a state statute requiring common carriers to serve all people alike regardless of color. The Court upheld the law as applied to steamships

transporting patrons between Michigan and Canada. Following the rule that each case must be adjudged on its particular facts, the Court concluded that neither *Hall* nor *Morgan* was "comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce . . . ; or in any actual probability of conflicting regulations by different sovereignties." 333 U. S., at 39.

We are not convinced that commerce will be unduly burdened if Continental is required by Colorado to refrain from racial discrimination in its hiring of pilots in that State. Not only is the hiring within a State of an employee, even for an interstate job, a much more localized matter than the transporting of passengers from State to State [6] but more significantly the threat of diverse and conflicting regulation of hiring practices is virtually nonexistent. In *Hall* and in *Morgan* the Court assumed the validity both of state laws requiring segregation and of state laws forbidding segregation. Were there a possibility that a pilot hired in Colorado could be barred solely because of his color from serving a carrier in another State, then this case might well be controlled by our prior holdings. But under our more recent decisions [7] any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The kind of burden that was thought possible in the *Hall* and *Morgan* cases, therefore, simply cannot exist here. It is, of course, possible that States could impose such onerous, harassing, and con-

[6] See, *e. g.*, *California* v. *Thompson*, 313 U. S. 109 (1941); *Erie R. Co.* v. *Williams*, 233 U. S. 685 (1914).

[7] *E. g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Bailey* v. *Patterson*, 369 U. S. 31 (1962).

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flicting conditions on an interstate carrier's hiring of employees that the burden would hamper the carrier's satisfactory performance of its functions. But that is not this case. We hold that the Colorado statute as applied here to prevent discrimination in hiring on account of race does not impose a constitutionally prohibited burden upon interstate commerce.

*Third.* Continental argues that federal law has so pervasively covered the field of protecting people in interstate commerce from racial discrimination that the States are barred from enacting legislation in this field. It is not contended, however, that the Colorado statute is in direct conflict with federal law,[8] that it denies rights granted by Congress,[9] or that it stands as an obstacle to the full effectiveness of a federal statute.[10] Rather Continental argues that:

> "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." [11]

But this Court has also said that the mere "fact of identity does not mean the automatic invalidity of state measures." [12] To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here.

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[8] See *McDermott* v. *Wisconsin*, 228 U. S. 115 (1913).

[9] See, *e. g.*, *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956).

[10] See, *e. g.*, *Hill* v. *Florida*, 325 U. S. 538 (1945); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941).

[11] *Charleston & W. C. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604 (1915).

[12] *California* v. *Zook*, 336 U. S. 725, 730 (1949).

Continental relies first on the Civil Aeronautics Act of 1938,[13] now the Federal Aviation Act of 1958,[14] and its broad general provisions forbidding air carriers to subject any particular person to "any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever" [15] and requiring "The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . ." [16] This is a familiar type of regulation, aimed primarily at rate discrimination injurious to shippers, competitors, and localities.[17] But we may assume, for present purposes, that these provisions prohibit racial discrimination against passengers and other customers [18] and that they protect job applicants or employees from discrimination on account of race. The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers,[19] much of which has been exercised by regulations.[20] Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938 and its successor had no express or

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[13] 52 Stat. 973, as amended, 49 U. S. C. (1952 ed.) §§ 401–722.

[14] The Civil Aeronautics Act of 1938 was substantially reenacted by the Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. §§ 1301–1542. Some of the powers and duties of the Civil Aeronautics Board were transferred to the Administrator of the Federal Aviation Agency.

[15] 49 U. S. C. (1952 ed.) § 484 (b), now 49 U. S. C. § 1374 (b).

[16] 49 U. S. C. (1952 ed.) § 402 (c), now 49 U. S. C. § 1302 (c).

[17] Compare Interstate Commerce Act § 3 (1), 49 U. S. C. § 3 (1).

[18] See *Fitzgerald* v. *Pan American World Airways*, 229 F. 2d 499 (C. A. 2d Cir. 1956); *United States* v. *City of Montgomery*, 201 F. Supp. 590 (M. D. Ala. 1962); cf. *Henderson* v. *United States*, 339 U. S. 816 (1950); *Mitchell* v. *United States*, 313 U. S. 80 (1941).

[19] See 49 U. S. C. (1952 ed.) §§ 552, 559, now 49 U. S. C. §§ 1422, 1429.

[20] See, *e. g.*, 14 CFR §§ 20.40, 20.42–20.45, 20.121, 21.1, 40.300.

implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains "dormant and unexercised," [21] will not frustrate any part of the purpose of the federal legislation.[22]

There is even less reason to say that Congress, in passing the Railway Labor Act [23] and making certain of its provisions applicable to air carriers, intended to bar States from protecting employees against racial discrimination. No provision in the Act even mentions discrimination in hiring. It is true that in several cases we have held that the exclusive bargaining agents authorized by the Act must not use their powers to discriminate against minority groups whom they are supposed to represent.[24] And we have held that employers too may be enjoined from carrying out provisions of a discriminatory bargaining agreement.[25] But the duty the Act imposes is one of fair representation and it is imposed upon the union. The employer is merely prohibited from aiding the union in breaching its duty. Nothing in the Railway Labor Act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act.

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[21] *Bethlehem Steel Co.* v. *New York State Labor Rel. Bd.*, 330 U. S. 767, 775 (1947). See *Parker* v. *Brown*, 317 U. S. 341 (1943); *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79 (1939).

[22] If the federal authorities seek to deal with discrimination in hiring practices and their power to do so is upheld, that would raise questions not presented here. Compare *California* v. *Thompson*, 313 U. S. 109 (1941), with *California* v. *Zook*, 336 U. S. 725 (1949).

[23] 44 Stat. 577, as amended, 45 U. S. C. §§ 151–188.

[24] See, *e. g.*, *Conley* v. *Gibson*, 355 U. S. 41 (1957); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944).

[25] See, *e. g.*, *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, 775 (1952).

Finally, we reject the argument that Colorado's Anti-Discrimination Act cannot constitutionally be enforced because of Executive Orders requiring government contracting agencies to include in their contracts clauses by which contractors agree not to discriminate against employees or applicants because of their race, religion, color, or national origin.[26] The District Court purported to take judicial notice that "a certificated commercial carrier by air [such as respondent] is obligated to and in fact does transport United States mail under contract with the United States Government." The Government answers that in fact it has no contract with Continental and that, while 49 U. S. C. § 1375 requires air lines to carry mail, it does not forbid discrimination on account of race or compel the execution of a contract subject to Executive Orders. We do not rest on this ground alone, however, nor do we reach the question of whether an Executive Order can foreclose state legislation. It is impossible for us to believe that the Executive intended for its orders to regulate air carrier discrimination among employees so pervasively as to preempt state legislation intended to accomplish the same purpose.

The judgment of the Supreme Court of Colorado is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

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[26] Executive Order No. 10479, 18 Fed. Reg. 4899 (Aug. 13, 1953), Executive Order No. 10557, 19 Fed. Reg. 5655 (Sept. 3, 1954), both revoked and superseded by Executive Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

# FERGUSON, ATTORNEY GENERAL OF KANSAS, ET AL. *v.* SKRUPA, DOING BUSINESS AS CREDIT ADVISORS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

No. 111. Argued March 20, 1963.—Decided April 22, 1963.

1. A Kansas statute making it a misdemeanor for any person to engage "in the business of debt adjusting," except as an incident to "the lawful practice of law," does not violate the Due Process Clause of the Fourteenth Amendment, since States have power to legislate against what they consider to be injurious practices in their internal commercial and business affairs, so long as their laws do not conflict with some specific federal constitutional prohibition or some valid federal law. Pp. 726–732.
2. The statute's exception of lawyers is not a denial of equal protection of the laws to nonlawyers. Pp. 732–733.

210 F. Supp. 200, reversed.

*William M. Ferguson,* Attorney General of Kansas, argued the cause and filed a brief for appellants. *Keith Sanborn* and *John F. Eberhardt* filed a brief for appellant Sanborn.

*Lawrence Weigand* argued the cause for appellee. With him on the brief was *Donald A. Bell.*

*Wilkie Bushby* and *Joseph Schreiber* filed a brief for the National Better Business Bureau, Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this case, properly here on appeal under 28 U. S. C. § 1253, we are asked to review the judgment of a three-judge District Court enjoining, as being in violation of the Due Process Clause of the Fourteenth Amendment, a Kansas statute making it a misdemeanor for any person to engage "in the business of debt adjusting" except as

an incident to "the lawful practice of law in this state." [1] The statute defines "debt adjusting" as "the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon."

The complaint, filed by appellee Skrupa doing business as "Credit Advisors," alleged that Skrupa was engaged in the business of "debt adjusting" as defined by the statute, that his business was a "useful and desirable" one, that his business activities were not "inherently immoral or dangerous" or in any way contrary to the public welfare, and that therefore the business could not be "absolutely prohibited" by Kansas. The three-judge court heard evidence by Skrupa tending to show the usefulness and desirability of his business and evidence by the state officials tending to show that "debt adjusting" lends itself to grave abuses against distressed debtors, particularly in the lower income brackets, and that these abuses are of such gravity that a number of States have strictly regulated "debt adjusting" or prohibited it altogether.[2] The

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[1] Kan. Gen. Stat. (Supp. 1961) § 21–2464.

[2] Twelve other States have outlawed the business of debt adjusting. Fla. Stat. Ann. (1962) §§ 559.10–559.13; Ga. Code Ann. (Supp. 1961) §§ 84–3601 to 84–3603; Me. Rev. Stat. Ann. (Supp. 1961) c. 137, §§ 51–53; Mass. Gen. Laws Ann. (1958) c. 221, § 46C; N. J. Stat. Ann. (Supp. 1962) 2A:99A–1 to 2A:99A–4; N. Y. Penal Law (Supp. 1962) §§ 410–412; Ohio Rev. Code Ann. (1962 Supp.) §§ 4710.01–4710.99; Okla. Stat. Ann. (Supp. 1962) Tit. 24, §§ 15–18; Pa. Stat. Ann. (Supp. 1961) Tit. 18, § 4899; Va. Code Ann. (1958) § 54–44.1; W. Va. Code Ann. (1961) § 6112 (4); Wyo. Stat. Ann. (1957) §§ 33–190 to 33–192. Seven other States regulate debt adjusting. Cal. Fin. Code Ann. (1955 and Supp. 1962) §§ 12200–12331; Ill. Stat. Ann. (Supp. 1962) c. 16½, §§ 251–272; Mich. Stat. Ann. (Supp. 1961) §§ 23.630 (1)–23.630 (18); Minn. Stat. Ann. (1947 and 1962

court found that Skrupa's business did fall within the Act's proscription and concluded, one judge dissenting, that the Act was prohibitory, not regulatory, but that even if construed in part as regulatory it was an unreasonable regulation of a "lawful business," which the court held amounted to a violation of the Due Process Clause of the Fourteenth Amendment. The court accordingly enjoined enforcement of the statute.[3]

The only case discussed by the court below as support for its invalidation of the statute was *Commonwealth* v. *Stone*, 191 Pa. Super. 117, 155 A. 2d 453 (1959), in which the Superior Court of Pennsylvania struck down a statute almost identical to the Kansas act involved here. In *Stone* the Pennsylvania court held that the State could regulate, but could not prohibit, a "legitimate" business. Finding debt adjusting, called "budget planning" in the Pennsylvania statute, not to be "against the public interest" and concluding that it could "see no justification for such interference" with this business, the Pennsylvania court ruled that State's statute to be unconstitutional. In doing so, the Pennsylvania court relied heavily on *Adams* v. *Tanner*, 244 U. S. 590 (1917), which held that the Due Process Clause forbids a State to prohibit a business which is "useful" and not "inherently immoral or dangerous to public welfare."

Both the District Court in the present case and the Pennsylvania court in *Stone* adopted the philosophy of *Adams* v. *Tanner*, and cases like it, that it is the province of courts to draw on their own views as to the morality,

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Supp.) §§ 332.04–332.11; Ore. Rev. Stat. (1961) §§ 697.610–697.992; R. I. Gen. Laws (Supp. 1962) §§ 5–42–1 to 5–42–9; Wis. Stat. Ann. (1957) § 218.02. The courts of New Jersey have upheld a New Jersey statute like the Kansas statute here in question. *American Budget Corp.* v. *Furman*, 67 N. J. Super. 134, 170 A. 2d 63, aff'd *per curiam*, 36 N. J. 129, 175 A. 2d 622 (1961).

[3] *Skrupa* v. *Sanborn*, 210 F. Supp. 200 (D. C. D. Kan. 1961).

legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York,* 198 U. S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas,* 236 U. S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital,* 261 U. S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,

> "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." [4]

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[4] *Tyson & Brother* v. *Banton,* 273 U. S. 418, 445, 446 (1927) (dissenting opinion). Mr. Justice Brandeis joined in this dissent, and Mr. Justice Stone dissented in an opinion joined by Mr. Justice Holmes and Mr. Justice Brandeis. Mr. Justice Sanford dissented separately.

And in an earlier case he had emphasized that, "The criterion of constitutionality is not whether we believe the law to be for the public good." [5]

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." [6] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." [7] It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do

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[5] *Adkins* v. *Children's Hospital,* 261 U. S. 525, 567, 570 (1923) (dissenting opinion). Chief Justice Taft, joined by Mr. Justice Sanford, also dissented. Mr. Justice Brandeis took no part.

[6] *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.,* 313 U. S. 236, 246 (1941) (upholding a Nebraska statute limiting the amount of the fee which could be charged by private employment agencies).

[7] *Sproles* v. *Binford,* 286 U. S. 374, 388 (1932). And Chief Justice Hughes, for a unanimous Court, added, "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." *Id.,* at 388–389.

not run afoul of some specific federal constitutional prohibition, or of some valid federal law." [8]

In the face of our abandonment of the use of the "vague contours" [9] of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital,* overruled by *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937). Not only has the philosophy of *Adams* been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having "clearly undermined" *Adams.*[10] We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislature to weigh the wisdom of legislation," [11] and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, im-

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[8] *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 536 (1949).

Mr. Justice Holmes even went so far as to say that "subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." *Tyson & Brother* v. *Banton,* 273 U. S. 418, 445, 446 (1927) (dissenting opinion).

[9] See *Adkins* v. *Children's Hospital,* 261 U. S. 525, 567, 568 (1923) (Holmes, J., dissenting).

[10] *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 535 (1949), referring to *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.,* 313 U. S. 236 (1941). Ten years later, in *Breard* v. *Alexandria,* 341 U. S. 622, 631–632 (1951), this Court again commented on the infirmity of *Adams.*

[11] *Day-Brite Lighting, Inc.,* v. *Missouri,* 342 U. S. 421, 423 (1952).

provident, or out of harmony with a particular school of thought." [12] Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.[13] The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.[14]

Nor is the statute's exception of lawyers a denial of equal protection of the laws to nonlawyers. Statutes create many classifications which do not deny equal protection; it is only "invidious discrimination" which offends the Constitution.[15] The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him, remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act—advice which a nonlawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers,[16] the Equal Protection

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[12] *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955).

[13] "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York*, 198 U. S. 45, 74, 75 (1905) (Holmes, J., dissenting).

[14] See *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, 224 (1949); *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604, 618 (1950).

[15] See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911).

[16] Massachusetts and Virginia prohibit debt pooling by laymen by declaring it to constitute the practice of law. Mass. Gen. Laws Ann. (1958) c. 221, § 46C; Va. Code Ann. (1958) § 54–44.1. The Massachusetts statute was upheld in *Home Budget Service, Inc.*, v. *Boston Bar Assn.*, 335 Mass. 228, 139 N. E. 2d 387 (1957).

Clause does not forbid it. We also find no merit in the contention that the Fourteenth Amendment is violated by the failure of the Kansas statute's title to be as specific as appellee thinks it ought to be under the Kansas Constitution.

*Reversed.*

MR. JUSTICE HARLAN concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491.

# DOWNUM *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 489. Argued March 20, 1963.—Decided April 22, 1963.

In a Federal District Court, petitioner was indicted on six counts for federal offenses. When his case was called for trial, both sides announced ready. A jury was selected and sworn and instructed to return at 2 p. m. When it did so, the prosecution asked that the jury be discharged because a key witness on two counts was not present. Petitioner moved that those two counts be dismissed for want of prosecution and that the trial continue on the remaining counts. That motion was denied, and the judge discharged the jury over petitioner's objection. Two days later, the case was called again; a second jury was impaneled; and petitioner pleaded former jeopardy. *Held:* In the circumstances of this case, that plea should have been sustained. Pp. 734–738.

300 F. 2d 137, reversed.

*Richard Tinsman,* by appointment of the Court, 371 U. S. 884, argued the cause and filed a brief for petitioner.

*Assistant Deputy Attorney General Geoghegan* argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, involving a federal prosecution for stealing from the mail and forging and uttering checks so stolen, presents a question under the Double Jeopardy Clause of the Fifth Amendment—". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." Petitioner and three others were charged in an indictment containing eight counts. The codefendants pleaded guilty, petitioner being tried alone

before a jury and convicted on all but Counts 1 and 2, which did not apply to him. The claim of double jeopardy arose as follows:

On the morning of April 25, 1961, the case was called for trial and both sides announced ready. A jury was selected and sworn and instructed to return at 2 p. m. When it returned, the prosecution asked that the jury be discharged because its key witness on Counts 6 and 7 was not present—one Rutledge, who was the payee on the checks involved in those counts. Petitioner moved that Counts 6 and 7 be dismissed for want of prosecution and asked that the trial continue on the rest of the counts. This motion was denied and the judge discharged the jury over petitioner's objection. Two days later when the case was called again and a second jury impaneled, petitioner pleaded former jeopardy. His plea was overruled, a trial was had, and he was found guilty. The Court of Appeals affirmed, 300 F. 2d 137; and we granted the petition for certiorari because of the seeming conflict between this decision and *Cornero* v. *United States,* 48 F. 2d 69, from the Ninth Circuit. 371 U. S. 811.

The present case was one of a dozen set for call during the previous week, and those cases involved approximately 100 witnesses. Subpoenas for all of them, including Rutledge, had been delivered to the marshal for service. The day before the case was first called, the prosecutor's assistant checked with the marshal and learned that Rutledge's wife was going to let him know where her husband was, if she could find out. No word was received from her and no follow-up was made. The prosecution allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found.

From *United States* v. *Perez,* 9 Wheat. 579, decided in 1824, to *Gori* v. *United States,* 367 U. S. 364, decided in 1961, it has been agreed that there are occasions when a

second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent. The classic example is a mistrial because the jury is unable to agree. *United States* v. *Perez, supra; Logan* v. *United States,* 144 U. S. 263, 298; *Dreyer* v. *Illinois,* 187 U. S. 71, 85–86; *Keerl* v. *Montana,* 213 U. S. 135. In *Wade* v. *Hunter,* 336 U. S. 684, the tactical problems of an army in the field were held to justify the withdrawal of a court-martial proceeding and the commencement of another one on a later day. Discovery by the judge during a trial that a member or members of the jury were biased *pro* or *con* one side has been held to warrant discharge of the jury and direction of a new trial. *Wade* v. *Hunter, supra,* 689; *Simmons* v. *United States,* 142 U. S. 148; *Thompson* v. *United States,* 155 U. S. 271. At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperious necessity to do so. *Wade* v. *Hunter, supra,* 690. Differences have arisen as to the application of the principle. See *Brock* v. *North Carolina,* 344 U. S. 424; *Green* v. *United States,* 355 U. S. 184, 188. Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States, supra,* 369. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised "only in very extraordinary and striking circumstances," to use the words of Mr. Justice Story in *United States* v. *Coolidge,* 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is "not against being twice punished, but against being twice put in jeopardy." *United States* v. *Ball,* 163 U. S. 662, 669.

The jury first selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence. That witness was essential only for two of the six counts concerning petitioner. Yet the prosecution opposed petitioner's motion to dismiss those two counts and to proceed with a trial on the other four counts—a motion the court denied. Here, as in *Wade* v. *Hunter, supra,* at 691, we refuse to say that the absence of witnesses "can never justify discontinuance of a trial." Each case must turn on its facts. On this record, however, we think what was said in *Cornero* v. *United States, supra,* states the governing principle. There a trial was first continued because prosecution witnesses were not present, and when they had not been found at the time the case was again called, the jury was discharged. A plea of double jeopardy was sustained when a second jury was selected, the court saying:

> "The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was

impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses." 48 F. 2d, at 71.

That view, which has some support in the authorities,[1] is in our view the correct one. We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." [2] This means that the judgment below must be and is

*Reversed.*

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[1] In *United States* v. *Watson*, 28 Fed. Cas. 499, 500–501, the court ruled as follows:

"The illness of the district attorney, it not appearing by the minutes that such illness occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, and the motion to put off the case for the term being made by such assistant, cannot be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of witnesses for the prosecution, it does not appear by the minutes that such absence was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity justifying the withdrawing of a juror. The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants. When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper." And see *United States* v. *Shoemaker*, 27 Fed. Cas. 1067.

[2] *United States* v. *Watson*, *supra*, note 1, p. 501.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The Court in applying the rule of *Cornero* v. *United States*, 48 F. 2d 69 (C. A. 9th Cir. 1931), says that "the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an *imperious* necessity to do so." (Emphasis supplied.) The Court of Appeals was urged to adopt the *Cornero* rule, but it refused. Applying that rule here, the Court orders the conviction reversed and petitioner set free.*

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*Both *Cornero* and *United States* v. *Watson*, 28 Fed. Cas. 499 (D. C. S. D. N. Y. 1868), which the Court says supports *Cornero*, are entirely distinguishable on their facts. In *Cornero* the Government sought a five-day continuance because its witnesses could not be found. This was followed by a mistrial and then two years later a second trial, as contrasted with a mere two-day delay in the instant case before a second jury was impaneled and the trial begun. It could therefore be said realistically that the Government proceeded at the first trial in *Cornero* without its evidence and that the retrial after two years was an harassment. Moreover, subpoenas in *Cornero* had neither been issued nor served, while here the subpoena had been issued but, for reasons which the trial court thought justifiable, it had not been served. In *Watson* the Court granted an eight-day continuance after the jury was sworn, on the ground that the District Attorney was ill and government witnesses were absent. Upon resumption of the trial the prosecutor asked that the case go off for the term because of the continued illness of the District Attorney. In holding that these circumstances did not warrant the discharge of the jury the Court observed that the illness of the District Attorney did not appear to have occurred after the jury was sworn, that apparently the government officers had not first learned of the absence of witnesses after the jury had been sworn, and that it was not shown that it was impossible for the Assistant District Attorney to conduct the trial. Nor was there any indication in *Watson* that subpoenas had been issued.

In *Wade* v. *Hunter,* 336 U. S. 684 (1949), this Court refused to follow the *Cornero* rule, which was characterized as holding that the absence of witnesses was not such an "imperious" or "urgent necessity" as to come within the recognized exception to the double jeopardy provision. *Id.,* at 691. The Court said:

> "We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision [*United States* v. *Perez,* 9 Wheat. 579 (1824)] to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to the defendants or to the public interest." *Ibid.*

I adhere to *Wade* v. *Hunter,* which in short holds that "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Id.,* at 690.

In order to apply the principles of *Wade* v. *Hunter,* it is necessary that the facts be recalled. On Wednesday or Thursday of the week preceding trial, some 12 cases, including petitioner's, were set by the court for the following Monday. This was, in the words of the trial judge, "very short notice." Transcript of Record, p. 18. Subpoenas were issued by the District Attorney's office for approximately 100 witnesses and placed in the hands of the marshal. The petitioner's case was No. 10 on the list, and the prosecutor stated that he did not foresee that it would be reached on Tuesday, the second day of the

week's hearings. The prosecutor's office was short-handed, one of the assistants being in the military service. The prosecutor who had been assigned to petitioner's case had learned from the marshal the previous day that the wife of a Mr. Rutledge, who was the key witness in petitioner's case, would inform them of her husband's whereabouts, if she should learn of it. Since the prosecutor was trying another case on the Tuesday morning that petitioner's case was called, he was unable immediately to contact the marshal and determine whether Mr. Rutledge was present, and he announced ready for trial without ascertaining this. The jury for petitioner's case was selected and then excused until 2 p. m., and the prosecutor proceeded to complete the hearing of his other case before noon. Then, upon checking with the marshal's office during the noon recess, the prosecutor discovered that Rutledge was not present. He immediately informed the judge in his chambers, and upon the opening of the afternoon session defense counsel was advised in open court that the key witness of the Government was not available and the case would have to go over a couple of days. A defense motion to dismiss two of the six counts in the indictment—those on which Rutledge was the key witness—on the ground of lack of prosecution and proceed to trial on the remaining counts was denied by the court, and the jury was discharged—all over objections from the defense. Two days later the case was called and the petitioner interposed his plea of double jeopardy. Thereafter, a second jury was impaneled, and petitioner was tried and found guilty on all counts.

The first jury had never begun to act in this case. Petitioner was never formally arraigned in the presence of the first jury, nor was any evidence presented or heard for or against him at that time, nor was he required to put on any defense. In addition, the second jury having been

impaneled two days later, there was no continued or prolonged anxiety, nor was the petitioner caused any additional expense or embarrassment, deprived of any right or prejudiced in any way. Neither has petitioner contended that one jury was more or less favorable than the other.

The conclusions of the trial court and the Court of Appeals indicate that they viewed the circumstances in which the prosecutor found himself as having resulted from excusable oversight. There is no indication that the prosecutor's explanation was a mere cover for negligent preparation or that his action was in any way deliberate. There is nothing in the record that even suggests that the circumstances were used by the prosecutor for the purpose of securing a more favorable jury or in any way to take advantage of or to harass the petitioner. Indeed, it appears to be just one of those circumstances which often creep into a prosecutor's life as a result of inadvertence when many cases must be handled during a short trial period.

We can of course visualize other ways of handling the situation. The judge might have held the first jury together, rather than discharging them, until Mr. Rutledge's attendance could have been obtained. But this, viewed prospectively from the moment the court acted, would have tied up 12 men on the panel for an indefinite period and disrupted the calendar for the entire week, if not longer. It is entirely understandable that the trial judge was concerned with his calendar. Moreover, even if a two-day continuance in the above manner—holding the first jury—were later held improper on appeal from the trial court's judgment, the petitioner could then be retried after suffering not only the time and expense of one full trial but also the disclosure of his defense. Nor is the claim of petitioner that the Government should have proceeded on the other counts of the indictment, which he claims did not require the testimony

of Rutledge, any more tenable. This not only would have required two trials but also might raise the legal proposition that the prosecution on the remaining two counts was barred. While ordinarily the other four counts might have been sufficient to support a maximum sentence, the prosecutor might well have had good reason, in addition to the obvious preference for one rather than two trials, for wanting all counts considered in one proceeding. The indictment charged the petitioner with forging and passing government checks and conspiring with two codefendants, who pleaded guilty, to commit those acts. Rutledge was the payee of some of the checks and might well have been an important, though not the key, witness with reference to the conspiracy. In fact, the prosecutor expressed to the trial court his opinion that, under the entire indictment, he could not safely go to trial without the attendance of Rutledge. Transcript of Record, pp. 19–20.

As I see the problem, the issue is whether the action of the prosecutor in failing to check on the presence of his witness before allowing a jury to be sworn was of such moment that it constituted a deprival of the petitioner's rights and entitled him to a verdict of acquittal without any trial on the merits. Obviously under the facts here he suffered no such deprivation. Ever since *Perez* this Court has recognized that the "ends of public justice" must be considered in determining such a question. 9 Wheat., at 580. In this light I cannot see how this Court finds that the trial judge abused his discretion in affording the Government a two-day period in which to bring forward its key witness who, to its surprise, was found to be temporarily absent. I believe that the "ends of public justice," to which Mr. Justice Story referred in *Perez,* require that the Government have a fair opportunity to present the people's case and obtain adjudication on the merits, rather than that the criminal be turned free because of the harmless oversight of the prosecutor.

# INTERSTATE COMMERCE COMMISSION *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 108. Argued February 28, 1963.—Decided April 22, 1963.*

Appellee railroads proposed reduced rates for trailer-on-flatcar service between certain points also served by coastal water carriers. The reduced rates, with certain exceptions not relevant here, equaled or exceeded the railroads' out-of-pocket costs; in many instances they equaled or exceeded the railroads' fully distributed costs; they were substantially on a parity with the water carriers' rates for the same traffic; but they were below the level maintained by the railroads for similar traffic between points not served by the water carriers. The Interstate Commerce Commission cancelled the reductions on the grounds that the water carriers could not compete with railroads at equal rates; that the reductions were an initial step in a general rate-cutting program which threatened the water carriers' continued existence; and that the water carriers were essential to national defense and an integral part of the national transportation system. The District Court reversed. *Held:* The judgment is vacated; the order of the Commission is set aside to the extent that it disallowed certain railroad trailer-on-flatcar rates, and the cause is remanded to the Commission for further proceedings consistent with this opinion. Pp. 746–764.

1. In the light of the legislative history of § 15a (3), added to the Interstate Commerce Act by the Transportation Act of 1958, there can be no doubt that its purpose was to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed and that Congress did not consciously or inadvertently defeat this purpose when it included in § 15a (3) a reference to the National Transportation Policy. Pp. 753–758.

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*Together with No. 109, *Sea-Land Service, Inc.*, v. *New York, New Haven & Hartford Railroad Co. et al.*; No. 110, *Seatrain Lines, Inc.*, v. *New York, New Haven & Hartford Railroad Co. et al.*; and No. 125, *United States* v. *New York, New Haven & Hartford Railroad Co. et al.*, on appeals from the same Court.

2. On the present record, the disallowance of the rates in question was not adequately supported. Pp. 758–764.

(a) In the light of the legislative history of § 15a (3), it is clear that Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode. Pp. 759–761.

(b) This Court disagrees with the conclusion of the District Court that the needs of the national defense are not an operative part of the National Transportation Policy; but this Court concludes that the Commission's reliance on the factor of "national defense," and perhaps of "commerce," in disallowing the rates in question was not supported by adequate findings or substantial evidence. Pp. 761–764.

199 F. Supp. 635, judgment vacated and cause remanded.

*Robert W. Ginnane, Warren Price, Jr.* and *Ralph S. Spritzer* argued the cause for appellants. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum* were on the brief for the United States. *Robert W. Ginnane* and *B. Franklin Taylor, Jr.* were on the brief for the Interstate Commerce Commission. *Warren Price, Jr.* was on the brief for appellant in No. 109. *Ralph D. Ray* and *Warren E. Baker* were on the brief for appellant in No. 110.

*Carl Helmetag, Jr.* argued the cause for appellees. With him on the brief were *James A. Bistline, Ernest D. Grinnell, Jr., J. Edgar McDonald, Charles P. Reynolds* and *Albert B. Russ.*

Briefs of *amici curiae,* urging reversal, were filed by *Peter T. Beardsley, Richard R. Sigmon* and *Bryce Rea, Jr.* for American Trucking Associations, Inc., et al., and by *Samuel H. Moerman, Arthur L. Winn, Jr., J. Raymond Clark* and *James M. Henderson* for Waterways Freight.

Brief of the National Industrial Traffic League, as *amicus curiae,* urging affirmance, was filed *by John F. Donelan* and *John M. Cleary.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case, involving four consolidated appeals from a three-judge District Court judgment setting aside an order of the Interstate Commerce Commission to the extent that it rejected certain proposed railroad rate decreases, brings before us important questions relating to the role of the Commission in its task of overseeing competition among different modes of transportation. The case is the first in which this Court has considered the interpretation and application of § 15a (3) of the Interstate Commerce Act, added by Congress in the Transportation Act of 1958.[1]

## I.

The two corporate appellants here, Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation), and Seatrain Lines, Inc., are common carriers by water engaged in the Atlantic-Gulf coastwise trade; they are the only two companies now performing this service. Sea-Land, which had operated as a "break-bulk" [2] carrier for many years, in 1957 suspended that service and converted

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[1] Section 15a (3) of the Interstate Commerce Act, 72 Stat. 572, 49 U. S. C. § 15a (3), provides:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

[2] This break-bulk service involved the physical unloading of freight from rail car or truck and the loading of the cargo into the ships, with the operation reversed at the port of destination.

four ships into crane-equipped trailerships, each capable of holding 226 demountable truck trailers. With these ships, freight could be moved by highway trailers to the port of origin, the trailers lifted onto the ships, and the process reversed at the port of destination. As a result, Sea-Land was able to provide a motor-water-motor service which afforded door-to-door delivery of goods from and to all shippers and consignees, even if not situated on a railroad siding, in containers that would not have to be opened in transit. Traditionally water rates, including water-rail and water-motor rates, have been lower than the corresponding all-rail rates, and when Sea-Land inaugurated its new trailership service in 1957, it published reduced rates which were generally 5% to 7½% lower than the corresponding all-rail boxcar rates. Some 700 of these reduced rates were placed under investigation by the Commission.

In Seatrain's service, freight is transported to the company's dock in railroad cars, the cars and their contents are then lifted onto Seatrain's vessels, and at destination the cars are unloaded and delivered by rail to the consignee. This rail-water-rail service is similar to railroad boxcar service, in that it permits carriage from shipper to consignee without breaking bulk when both shipper and consignee are located on railroad sidings.

Railroad "piggy-back," or trailer-on-flatcar (TOFC), service is like that provided by Sea-Land. A motor carrier trailer is hauled by road to a railhead, loaded onto a flatcar, and demounted at destination for delivery by motor carrier to the consignee.

Before 1957, railroad TOFC rates were generally higher than all-rail boxcar, water, and land-water rates. But in 1957, primarily in answer to the new improved service and lower rates offered by Sea-Land, the appellee railroads proposed to establish, on an experimental basis, reduced rates on 66 commodity movements between cer-

tain eastern points on the one hand and Fort Worth and Dallas, Texas, on the other.[3] These rates, which were substantially on a parity with Sea-Land and Seatrain rates on the same traffic, were suspended and placed under investigation by the Commission. In December 1960 the Commission disposed of 43 docket proceedings by issuing a consolidated report embracing the railroad TOFC rates involved here as well as a number of Sea-Land and Seatrain rates not now before us. 313 I. C. C. 23.

The Commission found that the proposed TOFC rates were compensatory, that is, they equaled or exceeded out-of-pocket costs, for all of the listed movements by railroad-leased flatcars capable of carrying two trailers (TTX cars), and for all but six of the listed movements by railroad-owned single trailer cars.[4] The Commission further found that the proposed rates equaled or exceeded fully

[3] Since the establishment of these reduced rates would leave higher rates in effect to and from certain intermediate points involving shorter hauls, thus violating the long- and short-haul provisions of § 4 (1) of the Act, 49 U. S. C. § 4 (1), the railroads also applied to the Commission for the relief from these provisions which § 4 (1) permits the Commission to grant. This fourth-section application was denied by the Commission because, for reasons summarized in the text of this opinion, the Commission found the proposed TOFC rates not shown to be just and reasonable. With respect to the fourth-section application itself, the Commission noted that "[n]o shippers or receivers located at the intermediate points oppose the granting of fourth-section relief." 313 I. C. C., at 33. Indeed, no individual shippers came forward to urge that the selective character of the reduced TOFC rates here involved in any way discriminated against them, and in this Court the National Industrial Traffic League, a nationwide organization of shippers, has filed a brief as *amicus curiae* urging affirmance of the decision below.

[4] The rates for these six movements were withdrawn and are not at issue. (The Commission had stated that it had no way of knowing the percentages of TOFC traffic that would move in TTX cars and the percentage that would move in railroad-owned cars and had thus concluded that the rates for the six movements in question had not been shown to be compensatory.)

distributed costs [5] for 43 of the 66 movements by TTX cars and 14 of 66 movements by railroad-owned cars.

Having made these findings, the Commission addressed itself to what it considered the "most important" question—"whether these [TOFC] rates constitute destructive competition." 313 I. C. C., at 44. It noted at the outset that, apart from the question of rates, most shippers prefer rail service to Sea-Land and Seatrain service and that, in order to attract traffic, the latter carriers must therefore establish rates somewhat below those of the railroads. As to relative costs, the Commission stated that Sea-Land costs, both out-of-pocket and fully distributed, were below railroad TOFC costs for all 66 movements using railroad-owned flatcars and for all but 2 of the 66 movements using TTX cars. But the Commission explicitly refrained from relying on these findings. Instead it concluded that because of a number of factors:

> "[W]e cannot determine on these records where the *inherent advantages* may lie as to any of the rates in issue. We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues." 313 I. C. C., at 46. (Emphasis added.)

The Commission acknowledged that the recently enacted § 15a (3) prohibited it from holding rail rates up to a particular level merely to protect the traffic of another

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[5] The Commission has stated, in discussing railroad costs, that: "Fully distributed costs based on the out-of-pocket costs plus a revenue-ton and revenue ton-mile distribution of the constant costs, including deficits, indicate the revenue necessary to a fair return on the traffic, disregarding ability to pay." *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, 513 (1945).

mode but emphasized that the prohibition was qualified by the phrase "giving due consideration to the objectives of the national transportation policy declared in this Act." [6] In this case, the Commission stated, the reduced TOFC rates were an initial step in a program of rate reductions that could "fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." 313 I. C. C., at 47. Since in the Commission's view the coastwise shipping so threatened was important to the national defense, to the shipping public, and to the economy of ports and coastal areas,[7] it concluded that the objectives

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[6] The National Transportation Policy, 54 Stat. 899, 49 U. S. C. preceding § 1, was added to the Interstate Commerce Act in 1940. It provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

[7] In support of these conclusions, the Commission quoted with approval passages from a 1955 report of the United States Maritime Administration, "A Review of the Coastwise and Intercoastal Shipping Trades," which emphasized the national defense importance of break-bulk cargo ships; from a 1950 congressional report, S. Rep. No. 2494, 81st Cong., 2d Sess. 17, which referred to "the importance to

of the National Transportation Policy required the establishment and maintenance of a differential between rail rates and those of Sea-Land and Seatrain which would enable the coastwise carriers to continue their service. The Commission decided that an appropriate differential to accomplish this purpose would be 6% over Sea-Land rates for TOFC service and somewhat less than 6% for boxcar service. Accordingly, the proposed TOFC rates were ordered to be canceled, without prejudice to the filing of new schedules in conformity with the Commission's views.[8]

The appellee railroads then brought this action before a three-judge District Court seeking to have the Com-

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national defense of having domestic tonnage readily available"; and from a 1945 Commission decision, *War Shipping Admin. T. A. Application,* 260 I. C. C. 589, 591, which spoke of the "dependency of ports and coastal areas upon the existence of water transportation."

[8] Five of the 10 Commissioners then in office joined in the entire report. A sixth, Commissioner Hutchinson, concurred, stating that he was "in general agreement with the majority report," 313 I. C. C., at 50, adding his own view that "the ultimate effect of approval of the [TOFC] schedules would be to allow rates of the high-cost carrier [TOFC] to gravitate to a level whereby the low-cost carrier [sea-land] will be forced to go below its full costs in order to participate in the traffic." *Id.*, at 51. He also expressed some doubt as to whether a 6% differential was warranted. Commissioner McPherson, concurring in part, would have approved all compensatory rates but would have imposed no differential. Three Commissioners (Commissioner Freas, joined by Chairman Winchell and Commissioner Webb) dissented on the ground that the Act neither required nor permitted "blanket protection" for water carriers or for any mode of transportation. *Id.*, at 51–52.

In view of our disposition of this case, it is not necessary to consider whether, in light of Commissioner Hutchinson's concurrence, the "majority report" in fact represented the views of a majority of the Commission and, if not, whether the Commission's decision could be sustained in the absence of any rationale commanding the support of a majority of the agency. Cf. *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U. S. 80.

mission's order set aside to the extent that it required cancellation of the proposed TOFC rates. In November 1961, the court handed down its opinion, setting aside the Commission's order in part and enjoining the Commission from canceling TOFC rates which return at least fully distributed costs, except on the basis of certain specified findings. 199 F. Supp. 635. The court held that "at least on this record," § 15a (3) prohibited the imposition of a rate differential to protect the water carriers. The reference to the National Transportation Policy in § 15a (3), the court said, was intended to qualify the prohibition of mandatory differentials

> ". . . only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier." 199 F. Supp., at 642.

The court went on to discuss in some detail its understanding of the way in which costs of service for the different transportation modes were determined, the possible reasons why the Commission had been reluctant to accept relative costs as critical, and the precise circumstances under which the Commission could properly require cancellation of certain TOFC rates. Finally, in rejecting the argument that a differential was required in the interests of the national defense, the court stated that the reference to the national defense in the National Transportation Policy was merely a "hoped-for 'end,' " not an operative policy, and that in any event the Commission's conclusion with respect to the national defense was not supported by adequate evidence.

We noted probable jurisdiction, 371 U. S. 808, because of the importance of the questions presented in effectuating the congressional design embodied in the Interstate Commerce Act.[9]

## II.

The significance of § 15a (3) to the determination of these appeals can best be understood after consideration of the legislative history of this provision.

Section 15a (3) was the result of several years of congressional consideration of the problems of the transportation industry as a whole and of the railroads in particular. Concerned with their declining share in an expanding market, and with what they regarded as improper administrative interference with their efforts to compete, the railroads vigorously supported legislation introduced in 1955 on the basis of a proposal by the Secretary of Commerce. H. R. 6141, 84th Cong., 1st Sess. This bill, which became known as "the three shall-nots," would have amended § 15a (1) of the Act to provide that in determining whether a rate is less than a reasonable minimum, the Commission

> ". . . shall not consider the effect of such charge on the traffic of any other mode of transportation; or

[9] There is some question as to precisely what rates are in issue here; the United States and the Commission suggest that these appeals relate only to the TOFC rates which are equal to or exceed fully distributed costs, since the court below did not enjoin the Commission from canceling compensatory TOFC rates under that level. As we read the opinion and judgment below, however, the Commission's order was set aside insofar as it canceled *all* of the proposed TOFC before the court, and thus any order entered by the Commission in the future with respect to those rates would be subject to full judicial review. Accordingly, we reject as too narrow the position that the relevance of the present appeals is limited to TOFC rates that return at least the fully distributed costs of carriage.

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> the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation . . . ."

This bill was strongly opposed by the Commission and by other carriers, and died in committee. A substantially similar bill, however, was introduced in the next Congress, H. R. 5523, 85th Cong., 1st Sess., and the Commission renewed its opposition. When, after hearings, a Senate subcommittee recommended a bill to its parent committee, it explicitly rejected the three "shall-nots." But at the same time it expressed its concern with "over-regulation" and emphasized that its own proposal to add a new § 15a (3) was designed to encourage competition among the different modes and to permit each mode to assert its *inherent advantages*. S. Rep. No. 1647, 85th Cong., 2d Sess. 10, 18–19. The bill at this stage provided that in a proceeding involving competition with another mode

> ". . . the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad *and not by such other mode.*" *Id.*, at 18. (Emphasis added.)

At hearings before the full Senate Commerce Committee, the Commission opposed the bill as drafted, not because it disagreed with the principles set out in the subcommittee report but because it feared that the language used, particularly the italicized portion, was inconsistent with those principles and was substantially equivalent to the three "shall-nots." Hearings on S. 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 165–185. In particular Commissioner (then Chairman) Freas expressed concern that if the Commission were foreclosed from considering the effect

of a rate on a competing mode, it would be powerless to reject a railroad rate which covered the railroad's out-of-pocket costs, even if that rate had the effect of destroying the inherent advantages of a lower-cost carrier. He stated:

> "Whenever conditions permit, given transportation should return the full cost of performing carrier service. . . . In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier." *Id.*, at 168.

Commissioner Freas made it clear that the Commission believed the railroads should be permitted to assert their inherent advantages too, *id.*, at 172, and suggested that any proposal specifically authorize the Commission to give "due consideration to the inherent cost and service advantages of the respective carriers," *id.*, at 169. In further discussion, it was indicated that it would be inconsistent with the National Transportation Policy to permit destruction of the inherent advantages of any mode of transportation, *id.*, at 170–171, 177, and when Senator Potter suggested the deletion of the phrase "and not by such other mode" and the addition of a reference to the National Transportation Policy, Chairman Freas answered: "We will buy Senator Potter's suggestion." *Id.*, at 177–178. Senator Potter's suggestion was adopted in the final version of the bill.

Other testimony of particular interest here is that of John L. Weller, President of Seatrain, who testified on behalf of Seatrain and Pan-Atlantic (now Sea-Land). In opposing the bill recommended by the subcommittee, Mr. Weller emphasized that he did not seek any more than

to make it possible for the Commission to preserve the inherent advantages of the water carriers he represented:

> "As I explained, our kind of operation can only exist with a differential under the railroad rates; that is No. 1. *We are not entitled to have such a differential, nor do I urge one, except in the case where cost is lower than the railroad cost.* We have no right to ask for anything more than that." *Id.*, at 30. (Emphasis added.)

The proposal reported out by the Senate Commerce Committee was in the form ultimately adopted by Congress and contained the key provision that rates "shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." The Committee, quoting with approval the subcommittee's report, made it clear that the purpose of the proposal was to permit each mode of transportation to assert its "inherent advantages, whether they be of service or of cost." S. Rep. No. 1647, 85th Cong., 2d Sess. 3. The new subsection, the Committee stated, was designed to reaffirm the intent of the 1940 Act, an intent that had been correctly construed by the Commission in 1945 in *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, but which, in the Committee's view, had not been consistently followed.[10] The particular passage in

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[10] During the hearings, Senator Smathers had referred to several Commission decisions, *e. g.*, *Petroleum Products in Ill. Territory*, 280 I. C. C. 681, 691 (1951); *Petroleum Products from Los Angeles to Arizona and New Mexico*, 280 I. C. C. 509 (1951), which were believed to have substantially departed from the principles laid down in *New Automobiles*. Hearings on S. 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 174–175.

the *New Automobiles* decision which the Committee endorsed contained the statement:

> "[T]here appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa." 259 I. C. C., at 538.

This theme—that Congress was firmly opposed to rates maintained by the Commission at an artificially high level merely to protect competing modes—was repeated in the House Commerce Committee report, H. R. Rep. No. 1922, 85th Cong., 2d Sess., and in the debates on the floor of both Houses. 104 Cong. Rec. 10822, 10841–10843, 10858–10859, 12524, 12531, 15528. As stated by Representative Harris, Chairman of the House Commerce Committee, if a carrier could provide a rate that was "fully compensatory," the Commission could not force it up to a higher level "just because it is necessary to keep another mode of transportation in business." *Id.*, at 12531. The mood of Congress was perhaps best summarized by Senator Smathers when he said:

> "[W]e are going to eliminate some of the paternalism which has heretofore existed in the minds of the Interstate Commerce Commission. I think we will breathe into our whole system of transportation some new competition, which of course is needed, because the public and the consumer will benefit therefrom." *Id.*, at 15528.

This revealing legislative history fills out the contours of § 15a (3). There can be no doubt that the purpose of this provision was to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed. The Commission, in the view of the proponents of the bill, had thwarted effective competition by insisting that each form of transpor-

tation subject to its jurisdiction must remain viable at all costs and must therefore receive a significant share of the traffic. It had, in the words of one Congressman, become a "giant handicapper." [11]

Moreover, it is clear that Congress did not consciously or inadvertently defeat this purpose when it included in § 15a (3) a reference to the National Transportation Policy. The principal reason for this reference, as the hearings show, was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business.

III.

We agree with the District Court that "at least on this record," the Commission's rejection of the TOFC rates here at issue and the requirement of a differential over the rates of the coastwise carriers were not consistent with the mandate of § 15a (3). In light of the findings and conclusions underlying the Commission's decision, and more particularly its putting aside the question of "inherent advantages," its insistence that TOFC rates, in the words of the prohibition in § 15a (3), "be held up to a particular level to protect the traffic" of the coastwise carriers cannot be justified on the basis of the objectives of the National Transportation Policy. Since the Commission appears to have relied principally on two aspects of that policy—(i) the prohibition of "unfair or destruc-

[11] Hearings, *supra*, note 10, at 82.

tive competitive practices," and (ii) the objective of preserving a transportation system "adequate to meet the needs of the commerce of the United States . . . and of the national defense" (note 6, *supra*)—we shall consider each of these aspects separately.

1. *Unfair or Destructive Competitive Practices.*—If there is one fact that stands out in bold relief in the legislative history of § 15a (3), it is that Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode. Moreover, neither the Commission representative nor the witness who testified on behalf of the appellant carriers (*supra,* pp. 754–756) took this position, since they too recognized that such an interpretation would be inconsistent with the mandate of the National Transportation Policy to "preserve the inherent advantages of *each*" mode of transportation. If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate. Section 15a (3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.

It is true that in the present case the Commission found that with respect to virtually all of the TOFC movements involved, Sea-Land's out-of-pocket and fully distributed costs were below those of the railroads. But the Commission at the same time explicitly stated that "we cannot determine on these records where the inherent advantages may lie as to *any* of the rates in issue." 313 I. C. C., at 46. (Emphasis added.) It is not for us to make this determination at this stage, or to decide in advance precisely how either carrier's inherent advantages should be measured or protected.[12] It may be, for example, that neither a comparison of "out-of-pocket" nor a comparison of "fully distributed" costs, as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantage on a given movement.[13] And even if the cost advantage on each movement were determined to lie with the coastwise carriers, it may be that some or all of the TOFC rates at issue here should be allowed to stand because they

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[12] It was argued below, and at least intimated here, that the railroads had failed to sustain the burden of proving that they had the relative cost advantage. But we agree with the court below that if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. Of course, when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue. See *Various Commodities from or to Ark. & Tex.*, 314 I. C. C. 215.

[13] The utility of the concepts of fully distributed and out-of-pocket costs may be limited to the area in which they have traditionally been used—that of determining the reasonableness of a rate from the standpoint of a carrier's own revenue requirements. If so, some different measure may be preferred for comparing the costs of two or more modes of transportation.

would not unduly impair that advantage.[14] These and other similar questions should be left for initial resolution to the Commission's informed judgment.

The court below set out at some length its understanding of the Commission's methods of arriving at carrier costs, its analysis of the role of "value-of-service" concepts in rate making, and its views of the precise circumstances under which the Commission could lawfully disallow the TOFC rates at issue. We find it unnecessary to consider that discussion in this instance, since we hold only that on the present record, the disallowance of the rates in question was not adequately supported. Cf. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87.

2. *The Needs of the Commerce of the United States and of the National Defense.*—The Commission gave considerable weight to the factor of "national defense" and perhaps of "commerce" in arriving at its decision. But the District Court discounted these factors, concluding that the reference in the National Transportation Policy to the national defense (and presumably to commerce as well) represented merely a "hoped-for 'end,'" not an operative policy. We disagree with this conclusion, but hold that the Commission's reliance on these

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[14] Even though carrier A may have lower costs than carrier B, the *overall advantage* may rest with B, for example, if the difference in cost is very slight but the service of B is so superior as to outweigh any such marginal cost difference. In this event a rate established by B may be lawful even if it has the effect of diverting some or all of A's traffic.

Conversely, the cost advantage of A over B may be so great that even if B were to reduce its rate to the level of its out-of-pocket costs, A might be able to continue to compete effectively and still charge a profitable rate. In this event B's reduced rate would not appear to impair A's inherent cost advantage.

factors was not supported by adequate findings or substantial evidence.

The primary reason for the reference to the National Transportation Policy in § 15a (3) was to confirm the Commission's power to protect the inherent advantages of all carriers from destructive competition. But we cannot conclude that this was the *only* reason, especially in view of the choice not to accept the Commission's proposal, which would have expressed the qualification in terms of the inherent advantage element alone. See p. 755, *supra*. Nor can we conclude that the statutory references to such vital considerations as national defense are mere window dressing, without any practical significance in terms of the Commission's function. "Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense." *United States* v. *Capital Transit Co.*, 325 U. S. 357, 362.

On the other hand, by recognizing the relevance of such considerations as national defense, we do not imply that these broad policy factors may be applied so freely as to nullify either the more particularized mandates of the National Transportation Policy or the clear congressional design embodied in § 15a (3). Normally, it is these more specific considerations that should govern the lawfulness of proposed rates in a case involving intermodal competition. Only under extraordinary circumstances may the Commission properly permit them to be outweighed. To justify such a result, we believe it must be demonstrated that the proposed rates in themselves genuinely threaten the continued existence of a transportation service that is uniquely capable of filling a transcendent national defense or other public need.

Measured against this standard, the Commission's conclusions cannot be sustained. The Commission did state that the proposed rates were an "initial step" in a pro-

gram of rate reductions that "can fairly be said to threaten" the existence of the coastwise carriers, but it made no findings, and referred to no supporting evidence, to the effect that these particular TOFC rates would drive the corresponding water carrier rates below a profitable level or otherwise endanger the carriers' survival. Cf. *Burlington Truck Lines, Inc.*, v. *United States*, 371 U. S. 156, 167–168; *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115, 130–131. It is not enough to rely on the possible effect of other rate reductions not here in issue, a situation with which the Commission has ample power to deal if occasion arises.

Nor did the Commission present an adequate basis for concluding that either the national defense or any significant segment of the country's commerce depends upon the operation of Sea-Land or Seatrain.[15] We need not consider the question whether reliance on other additional sources might have been sufficient,[16] for we believe that the question is one for initial determination by the Commission, and that all parties should have an opportunity to adduce relevant evidence, including any evidence tending to indicate that *disallowance* of the proposed TOFC rates might adversely affect the commerce

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[15] The materials relied upon by the Commission are referred to in note 7, *supra*. These materials were general in nature, and the most recent dated back to 1955. Further, they were not sufficiently related to the specific service rendered by Sea-Land and Seatrain, which, we were informed by Sea-Land's counsel at oral argument, have a combined total of only eight ships currently in operation.

[16] The Commission in its brief has cited the 1960 testimony of Vice Admiral Wilson and of the Mayor of Savannah, Georgia, in Decline of Coastwise and Intercoastal Shipping Industry, Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 83–86, 105–106, and has also cited a 1961 letter from Vice Admiral Sylvester to Senator Butler, reproduced at 107 Cong. Rec. 7299–7302.

or the national defense of the country. Once raised, these considerations (like the factor of inherent advantage) do not exist solely for the benefit of protesting carriers.

In conclusion: We agree with the District Court that the Commission's order, insofar as it related to the TOFC rates at issue, must be set aside. We disagree, however, with that court's determination that the needs of the national defense are not an operative part of the National Transportation Policy, and we deem it inappropriate to approve or disapprove of other aspects of the court's opinion. Accordingly, we decide that the judgment below should be vacated, the order of the Commission set aside to the extent that it related to certain railroad TOFC rates described herein, and the cause remanded to the Commission for further proceedings consistent with this opinion.

*It is so ordered.*

# WILLIAMS *v.* ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR REHEARING.

No. 133. Decided April 22, 1963.

Rehearing granted; order dismissing writ of certiorari vacated; judgment of Court of Appeals vacated; and case remanded to District Court for further proceedings.

Reported below: 111 U. S. App. D. C. 294, 296 F. 2d 416.

*David I. Shapiro* and *Sidney Dickstein* for petitioner.

*Solicitor General Cox, Assistant Attorney General Douglas, Stephen J. Pollak, Alan S. Rosenthal* and *David L. Rose* for respondents.

PER CURIAM.

In view of the factual contentions advanced in the petition for rehearing filed by the petitioner and in the respondents' reply thereto, the petition for rehearing is granted and the order heretofore entered, 371 U. S. 531, dismissing the writ of certiorari is vacated. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court with instructions to hold a hearing and determine whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations by making timely and sufficient attempt to obtain their presence or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses for cross-examination. Upon making such determination, the District Court shall thereupon enter such further order or judgment as may be appropriate.

## RICE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 15, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 134 So. 2d 12.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

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## HATTEN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 32, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se*.

*Richard W. Ervin*, Attorney General of Florida, and *Reeves Bowen*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

## GILES ET AL. *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 834. Decided April 22, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 229 Md. 370, 183 A. 2d 359.

*Hal Witt* and *Richard J. Scupi* for appellants.

*Thomas B. Finan,* Attorney General of Maryland, *Robert C. Murphy,* Deputy Attorney General, and *Russell R. Reno, Jr.,* Assistant Attorney General, for appellee.

*James H. Heller* and *Lawrence Speiser* for the National Capital Area Civil Liberties Union, as *amicus curiae,* in support of appellants.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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## WEIGNER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 56, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## GARNER *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 67, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: See 196 Pa. Super. 578, 176 A. 2d 177.

*Edward Q. Carr, Jr.* for petitioner.

*Arlen Specter* and *Louis F. McCabe* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

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## VECCHIOLLI *v.* MARONEY, CORRECTIONAL SUPERINTENDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 74, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Arlen Specter* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

## WATT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 575, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Richard W. Ervin,* Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

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## ARNOLD *v.* DIRECTOR, FLORIDA DIVISION OF CORRECTIONS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 771, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 145 So. 2d 478.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

692-437 O-63—53

## HAYNES *v.* FLORIDA.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. 37, Misc. Decided April 22, 1963.

Motion for leave to file petition for writ of habeas corpus denied; certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se*.

*Richard W. Ervin*, Attorney General of Florida, and *A. G. Spicola, Jr.*, Special Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The motion for leave to file a petition for writ of habeas corpus is denied. Treating the papers submitted as a petition for writ of certiorari to the Supreme Court of Florida, certiorari is granted. On writ of certiorari, the judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

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## PATTERSON ET AL. *v.* NEWPORT NEWS REDEVELOPMENT & HOUSING AUTHORITY.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 896, Misc. Decided April 22, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

## TILLER *v.* CALIFORNIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 797, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 206 Cal. App. 2d 534, 23 Cal. Rptr. 876.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their opinions in *Douglas* v. *California,* 372 U. S., at 358, 360.

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## PATTERSON *v.* CITY OF NEWPORT NEWS.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 983, Misc. Decided April 22, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

# TREADWELL CONSTRUCTION CO. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 120. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded to District Court for further consideration.

Reported below: 299 F. 2d 789.

*Harold E. McCamey* and *Frederick T. M. Crowley* for petitioner.

*Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is vacated and the case is remanded to the United States District Court for the Western District of Pennsylvania for further consideration in light of *Weyerhaeuser Steamship Co.* v. *United States*, 372 U. S. 597.

## WALKER *v.* RANDOLPH, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WILLIAMSON COUNTY, ILLINOIS.

No. 2, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*William G. Clark,* Attorney General of Illinois, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## LaFORGE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 6, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se*.

*Richard W. Ervin*, Attorney General of Florida, and *Bruce R. Jacob*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

## TYLER *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 8, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## PATTERSON *v.* WARDEN, MARYLAND PENITENTIARY.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 14, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 227 Md. 194, 175 A. 2d 746.

Petitioner *pro se.*

*Thomas B. Finan,* Attorney General of Maryland, and *Gerard W. Wittstadt,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## LINDNER *v.* NASH, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 61, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## TULL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 126, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## DOUGLAS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 219, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

## JORDAN *v.* WIMAN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 250, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 273 Ala. 709, 142 So. 2d 679.

Petitioner *pro se*.

*MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

## DOUGHTY *v.* MAXWELL, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 516, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 173 Ohio St. 407, 183 N. E. 2d 368.

Petitioner *pro se*.

*Mark McElroy*, Attorney General of Ohio, and *James E. Rattan*, Assistant Attorney General, for respondent.

PER CURIAM:

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

## HARTSFIELD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 522, Misc. Decided April 22, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

*Richard W. Ervin,* Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 782 and 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

## ORDERS FROM FEBRUARY 18 THROUGH APRIL 26, 1963.

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FEBRUARY 18, 1963.

*Miscellaneous Orders.*

No. 12, Original. HAWAII *v.* GORDON (FORMERLY BELL). The motion of the plaintiff to advance is granted and the case is set for oral argument on Monday, April 15, 1963. MR. JUSTICE WHITE took no part in the consideration or decision of this motion. *Bert T. Kobayashi,* Attorney General of Hawaii, *Thurman Arnold, Abe Fortas, Paul A. Porter* and *Dennis G. Lyons* on the motion. [For earlier orders herein, see 371 U. S. 804; 371 U. S. 966.]

No. 119. MURRAY ET AL. *v.* CURLETT ET AL., CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY. Certiorari, 371 U. S. 809, to the Court of Appeals of Maryland; and

No. 142. SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL. *v.* SCHEMPP ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. (Probable jurisdiction noted, 371 U. S. 807.) The motion to strike certain matter from the appendix to the respondents' brief in No. 119 is denied. The motion of Synagogue Council of America et al. for leave to file a brief, as *amici curiae,* in Nos. 119 and 142 is granted. *Leonard J. Kerpelman* for petitioners in No. 119 on the motion to strike. *Francis B. Burch* for respondents in No. 119 in opposition to motion to strike. *Leo Pfeffer* on the motion for Synagogue Council of America et al.

No. 97. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* BOSTON & MAINE RAILROAD ET AL.;

No. 98. MARYLAND PORT AUTHORITY ET AL. *v.* BOSTON & MAINE RAILROAD ET AL.; and

No. 99. INTERSTATE COMMERCE COMMISSION *v.* BOSTON & MAINE RAILROAD ET AL. Appeals from the United States District Court for the District of Massachusetts. (Probable jurisdiction noted, 370 U. S. 914.) The motion of *John H. Colgren* for leave to withdraw his appearance as counsel for appellees is granted. The motion for enlargement of time for oral argument is granted and 45 additional minutes are allotted to each side. MR. JUSTICE WHITE took no part in the consideration or decision of these motions. *Thomas E. Dewey* on the motion for enlargement of time for oral argument.

No. 108. INTERSTATE COMMERCE COMMISSION *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.;

No. 109. SEA-LAND SERVICE, INC., *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.;

No. 110. SEATRAIN LINES, INC., *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.; and

No. 125. UNITED STATES *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. Appeals from the United States District Court for the District of Connecticut. (Probable jurisdiction noted, 371 U. S. 808.) The motion of the appellants for an allotment of additional time for oral argument is granted and 30 minutes are allotted for that purpose. *Solicitor General Cox* for the United States et al. on the motion. *Warren Price, Jr.* for appellant in No. 109 in support of the motion.

No. 773, Misc. JONES *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. Motion for leave to file petition for writ of mandamus denied.

No. 222. PENSICK & GORDON, INC., *v.* CALIFORNIA MOTOR EXPRESS ET AL. The joint motion to recall and amend the judgment of this Court is granted. It is ordered that the certified copy of the judgment sent to the District Court be recalled and that such judgment be vacated. It is further ordered that the order entered in this case on December 3, 1962, 371 U. S. 184, is amended to provide for a remand of the case to the United States Court of Appeals for the Ninth Circuit. *Carl M. Gould* for petitioner. *Theodore W. Russell, George Catlin, Walt A. Steiger* and *Joseph P. Loeb* for respondents.

No. 229. GUTIERREZ *v.* WATERMAN STEAMSHIP CORP. Certiorari, 371 U. S. 810, to the United States Court of Appeals for the First Circuit. The motion of Ellerman & Bucknall Steamship Co., Ltd., et al. for leave to file a brief, as *amici curiae*, is granted. *T. E. Byrne, Jr.* and *Mark D. Alspach* on the motion.

No. 271. DAVIS, TRUSTEE, *v.* SOJA, INTERNAL REVENUE AGENT. Certiorari, 371 U. S. 810, to the United States Court of Appeals for the Seventh Circuit. The joint motion to postpone the oral argument is granted. *Walter J. Rockler* for petitioner. *Solicitor General Cox* for respondent.

No. 782, Misc. WOOTEN *v.* BOMAR, WARDEN;
No. 807, Misc. CRAIG *v.* UNITED STATES;
No. 818, Misc. RINE *v.* BOLES, WARDEN; and
No. 820, Misc. MACFADDEN *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 682, Misc. SULLIVAN *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 800, Misc. SPENCER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 823, Misc. SHELDON ET AL. *v.* MERRILL, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Hayden C. Covington* for petitioners.

No. 793, Misc. BOSLER *v.* SUPREME COURT OF MISSOURI. Motion for leave to file petition for writ of prohibition and for other relief denied.

*Probable Jurisdiction Noted.*

No. 32. ENGLAND ET AL. *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. Probable jurisdiction noted. *J. Minos Simon* and *Russell Morton Brown* for appellants. *Robert E. LeCorgne, Jr.* and *St. Clair Adams, Jr.* for appellees. *Ashton Phelps* for Louisiana State Medical Society, intervenor. Reported below: 194 F. Supp. 521.

No. 684. ANDERSON ET AL. *v.* MARTIN. Appeal from the United States District Court for the Eastern District of Louisiana. Probable jurisdiction noted. *Jack Greenberg* and *James M. Nabrit III* for appellants. Reported below: 206 F. Supp. 700.

*Certiorari Granted.*

No. 732. BROOKS *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari granted. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Sherman L. Cohn* for petitioner. *Pat Mehaffy* and *Robert V. Light* for respondent. Reported below: 308 F. 2d 531.

No. 583. BROTHERHOOD OF RAILROAD TRAINMEN *v.* VIRGINIA EX REL. VIRGINIA STATE BAR. Supreme Court of Appeals of Virginia. Certiorari granted. *Beecher E. Stallard, John J. Naughton* and *Edward B. Henslee, Jr.* for petitioner. *Aubrey R. Bowles, Jr.* and *Aubrey R. Bowles III* for respondent.

No. 403. BANCO NACIONAL DE CUBA *v.* SABBATINO, RECEIVER, ET AL. Motion of *Winthrop S. Emmet* for leave to withdraw his appearance as counsel for respondents granted. Motion of Cuban-American Sugar Co. et al. for leave to file a brief, as *amici curiae,* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Joseph Slavin* for Sabbatino, and *C. Dickerman Williams* for Farr et al., respondents. *Solicitor General Cox* for the United States in support of the petition. *John G. Laylin* for Cuban-American Sugar Co. et al., as *amici curiae,* in opposition. Reported below: 307 F. 2d 845.

No. 659. YIATCHOS *v.* YIATCHOS, EXECUTRIX, ET AL. Supreme Court of Washington. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *Richard G. Jeffers* for petitioner. Reported below: 60 Wash. 2d 179, 373 P. 2d 125.

No. 664. TILTON ET AL. *v.* MISSOURI PACIFIC RAILROAD CO. Motion of the Veterans of Foreign Wars National Rehabilitation Service for leave to file a brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Sherman L. Cohn* for peti-

tioners. *John Guandolo* for respondent. *George S. Parish* for the Veterans of Foreign Wars National Rehabilitation Service, as *amicus curiae*, in support of the petition. Reported below: 306 F. 2d 870.

No. 42, Misc. ARCENEAUX *v.* LOUISIANA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Louisiana granted. Case transferred to the appellate docket. *J. Minos Simon* for petitioner.

*Certiorari Denied.* (*See also No. 647, ante, p. 227; and No. 800, Misc., supra.*)

No. 30. DUGUID ET UX. *v.* BEST, SUPERVISOR, BUREAU OF LAND MANAGEMENT, ET AL. C. A. 9th Cir. Certiorari denied. *Lewis E. Hoffman, Leon BenEzra* and *Charles L. Gilmore* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for respondents. Reported below: 291 F. 2d 235.

No. 530. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Julius A. Itzkowitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 308 F. 2d 657.

No. 575. BREGMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Thomas D. McBride* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 306 F. 2d 653.

No. 615. THE MATADOR ET AL. *v.* MOREWITZ, ADMINISTRATRIX. C. A. 4th Cir. Certiorari denied. *Walter B. Martin, Jr.* for petitioners. Reported below: 306 F. 2d 144.

No. 373. PAUL, DIRECTOR OF AGRICULTURE OF CALIFORNIA, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Stanley Mosk,* Attorney General of California, *Lawrence E. Doxsee* and *John Fourt,* Deputy Attorneys General, and *Roger Kent* for petitioners. *Solicitor General Cox* for the United States. Reported below: See 190 F. Supp. 645.

No. 622. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert H. McNeill* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 308 F. 2d 715.

No. 625. TEXACO PUERTO RICO, INC., *v.* DESCARTES, TREASURER OF PUERTO RICO. C. A. 1st Cir. Certiorari denied. *James R. Beverley* for petitioner. *J. B. Fernandez-Badillo,* Solicitor General of Puerto Rico, and *Rodolfo Cruz Contreras,* Deputy Solicitor General, for respondent. Reported below: 304 F. 2d 184.

No. 629. HAUSFELD *v.* ZIEGLER. Supreme Court of Ohio. Certiorari denied. *Melvin Edward Schaengold* for petitioner. *Robert N. Ziegler, pro se,* and *Robert M. Dennis* for respondent.

No. 639. VOLASCO PRODUCTS CO. ET AL. *v.* LLOYD A. FRY ROOFING CO. C. A. 6th Cir. Certiorari denied. *Wm. C. Wilson* for petitioners. *Burton Y. Weitzenfeld* for respondent. Reported below: 308 F. 2d 383.

No. 655. PACIFIC QUEEN FISHERIES ET AL. *v.* SYMES ET AL. C. A. 9th Cir. Certiorari denied. *Wilbur E. Dow, Jr.* for petitioners. *Albert E. Stephan* for respondents. Reported below: 307 F. 2d 700.

No. 611. PUBLIC UTILITY DISTRICT No. 1, PEND OREILLE COUNTY, WASHINGTON, *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Clarence C. Dill, Lloyd W. Ek, Joseph Volpe, Jr.* and *Bennett Boskey* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Alan S. Rosenthal, Howard E. Shapiro, Richard A. Solomon, Howard E. Wahrenbrock, Thomas M. Debevoise* and *Josephine H. Klein* for the Federal Power Commission, and *A. C. Van Soelen, Richard S. White, William A. Helsell, Robert L. McCarty* and *Charles F. Wheatley, Jr.* for the City of Seattle, respondents. Reported below: 113 U. S. App. D. C. 363, 308 F. 2d 318.

No. 621. OLIVER ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Sidney Dickstein* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Floyd L. France* for respondent. *Arthur Lazarus, Jr.* and *Daniel M. Singer* for the Association on American Indian Affairs, as *amicus curiae*, in support of the petition. Reported below: 113 U. S. App. D. C. 212, 306 F. 2d 819.

No. 648. KING COUNTY *v.* TRICON, INC. Supreme Court of Washington. Certiorari denied. *William L. Paul, Jr.* for petitioner. *Martin P. Detels, Jr.* for respondent. Reported below: 60 Wash. 2d 392, 374 P. 2d 174.

No. 660. FRANKHOUSER *v.* KISSINGER, ADMINISTRATRIX, ET AL. C. A. 4th Cir. Certiorari denied. *Robert M. Furniss, Jr.* and *Harry N. Gustin* for petitioner. *Stanley E. Sacks* for respondents. Reported below: 308 F. 2d 348.

No. 663. CROWE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* and *Theodore Krieger* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 308 F. 2d 537.

No. 668. TAYLOR *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied. *Fred Roland Allaben* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, and *Robert A. Derengoski,* Solicitor General, for respondents. Reported below: 367 Mich. 256, 116 N. W. 2d 848.

No. 669. ISELIN ET AL. *v.* MENG ET AL. C. A. 5th Cir. Certiorari denied. *L. Bryan Dabney* for petitioners. Reported below: 307 F. 2d 455.

No. 670. HAUPTMAN, TRUSTEE IN BANKRUPTCY, *v.* DIRECTOR OF INTERNAL REVENUE ET AL. C. A. 2d Cir. Certiorari denied. *Harry H. Schutte* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondents. Reported below: 309 F. 2d 62.

No. 671. WAGNER, ADMINISTRATOR, *v.* FAWCETT PUBLICATIONS ET AL. C. A. 7th Cir. Certiorari denied. *Louis M. Marsh* for petitioner. *Howard Ellis, Don H. Reuben, John E. Angle* and *Thomas A. Diskin* for Fawcett Publications, and *David B. Bartell* for T. D. Publishing Co., respondents. Reported below: 307 F. 2d 409.

No. 675. RHODES *v.* HOUSTON ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Clarence A. H. Meyer,* Attorney General of Nebraska, and *Robert A. Nelson,* Special Assistant Attorney General, for respondents. Reported below: 309 F. 2d 959.

No. 662. TRENT TRUST CO., LTD., ET AL. *v.* KENNEDY, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William D. Donnelly* and *Lucien H. Boggs* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Morton Hollander, Anthony L. Mondello* and *Armand B. DuBois* for respondent. Reported below: 113 U. S. App. D. C. 217, 307 F. 2d 174.

No. 672. GIANT FOOD INC. *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raymond R. Dickey* and *Bernard Gordon* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel, James McI. Henderson* and *E. K. Elkins* for respondent. Reported below: 113 U. S. App. D. C. 227, 307 F. 2d 184.

No. 674. WORLD COMMERCE CORP., S. A., *v.* MINERALS & CHEMICALS PHILIPP CORP. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *A. Vernon Carnahan* for petitioner. *Leo T. Kissam* for respondent. Reported below: 15 App. Div. 2d 432, 224 N. Y. S. 2d 763.

No. 680. KASTEN ET UX. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Dominic H. Frinzi* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States et al.

No. 692. GOLDSTEIN *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Louis B. Fine* and *Howard I. Legum* for petitioner.

No. 676. GIBRALTAR INDUSTRIES, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *H. Raymond Cluster* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 307 F. 2d 428.

No. 677. MCCORMICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.* and *Anna R. Lavin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 309 F. 2d 367.

No. 679. WASHINGTON TOLL BRIDGE AUTHORITY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John J. O'Connell,* Attorney General of Washington, and *John W. Riley,* Special Assistant Attorney General, for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 307 F. 2d 330.

No. 682. NEALE *v.* KINNEY ET AL., CO-EXECUTORS. Supreme Court of Illinois. Certiorari denied. *Louis G. Davidson, William C. Wines* and *Lowell L. Dryden* for petitioner. *Thomas C. McConnell* for respondents. Reported below: See 35 Ill. App. 2d 140, 182 N. E. 2d 366.

No. 683. SAVON GAS STATIONS NUMBER SIX, INC., ET AL. *v.* SHELL OIL CO. C. A. 4th Cir. Certiorari denied. *Lawrence I. Weisman* for petitioners. *William Simon* and *John Bodner, Jr.* for respondent. Reported below: 309 F. 2d 306.

No. 691. MANCINI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 685. GORHAM & JOHNSON, INC., *v.* CHRYSLER CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. *W. B. Harrell* and *Fred S. Abney* for petitioner. *William D. Neary* for respondents. Reported below: 308 F. 2d 462.

No. 693. LEGATE *v.* MALONEY, RECEIVER. C. A. 1st Cir. Certiorari denied. *Mark M. Horblit* for petitioner. *Marcien Jenckes* and *Charles H. Morin* for respondent. Reported below: 308 F. 2d 228.

No. 694. NORTHEAST AIRLINES, INC., *v.* PEARSON, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *William J. Junkerman* and *James B. McQuillan* for petitioner. *Frank G. Sterritte, Stuart M. Speiser* and *Edward M. O'Brien* for respondent. Reported below: 309 F. 2d 553.

No. 695. LINCOLN NATIONAL LIFE INSURANCE CO. *v.* ROOSTH. C. A. 5th Cir. Certiorari denied. *Thos. B. Ramey* and *Jack W. Flock* for petitioner. *Chas. F. Potter* for respondent. Reported below: 306 F. 2d 110.

No. 696. DRILL *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Sherman L. Cohn* for the United States. Reported below: —— Ct. Cl. ——.

No. 709. KENITE CORPORATION *v.* UNITED STATES; and

No. 784. UNITED STATES *v.* KENITE CORPORATION. Court of Claims. Certiorari denied. *Smith W. Brookhart, Ralph E. Becker, Irving G. McCann* and *Malvern J. Sheffield, Jr.* for Kenite Corporation. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——.

No. 698. WEITZNER, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 309 F. 2d 45.

No. 699. NEFF ET UX. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Norman A. Peil, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: — Ct. Cl. —, 305 F. 2d 455.

No. 701. KLEIN *v.* WALSTON & Co., INC. Court of Appeals of New York. Certiorari denied. *Maximilian Bader* for petitioner. *Williamson Pell, Jr.* for respondent. Reported below: 12 N. Y. 2d 676, 185 N. E. 2d 907.

No. 710. FUTCH ET AL. *v.* GREER ET AL. Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Certiorari denied. *Ben F. Foster* for petitioners. *Waggoner Carr,* Attorney General of Texas, and *Morgan Nesbitt,* Assistant Attorney General, for respondents. Reported below: 353 S. W. 2d 896.

No. 711. NATIONAL BULK CARRIERS, INC., ET AL. *v.* GARDNER, ADMINISTRATRIX. C. A. 4th Cir. Certiorari denied. *R. Arthur Jett* for petitioners. *Sidney H. Kelsey* for respondent. Reported below: 310 F. 2d 284.

No. 719. NADIAK *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 5th Cir. Certiorari denied. *Allan Milledge* and *Neal Rutledge* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Nathaniel H. Goodrich* for respondents. Reported below: 305 F. 2d 588.

No. 703. SMITH *v.* MERCER, CHIEF JUDGE. C. A. 7th Cir. Certiorari denied. *Mozart G. Ratner* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for respondent.

No. 714. TENNESSEE EX REL. STALL ET AL. *v.* CITY OF KNOXVILLE. Supreme Court of Tennessee. Certiorari denied. *G. Edward Friar* and *William A. Reynolds* for petitioners. *C. R. McClain* for respondent. Reported below: 211 Tenn. —, 364 S. W. 2d 898.

No. 716. THIBODEAUX ET AL. *v.* COMEAUX ET AL. Supreme Court of Louisiana. Certiorari denied. *Sam H. Jones* for petitioners. Reported below: 243 La. 468, 145 So. 2d 1.

No. 718. SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES & INLAND WATER DISTRICT, PUERTO RICO DIVISION, AFL–CIO, *v.* PUERTO RICO LABOR RELATIONS BOARD. Supreme Court of Puerto Rico. Certiorari denied. *Richard P. Long* for petitioner.

No. 721. MAY *v.* PENNSYLVANIA RAILROAD CO. Court of Appeals of Ohio, Franklin County. Certiorari denied. *C. Richard Grieser* for petitioner. *Robert L. Barton* for respondent.

No. 724. SOUTHWEST MAGAZINE CO. *v.* CITY OF FORT WORTH. Supreme Court of Texas and Court of Civil Appeals of Texas, Second Supreme Judicial District. Certiorari denied. *Winfred Hooper, Jr.* for petitioner. *S. G. Johndroe, Jr.* for respondent. Reported below: 358 S. W. 2d 139.

No. 717. LYNCHBURG TRAFFIC BUREAU *v.* SMITH'S TRANSFER CORP. OF STAUNTON, VIRGINIA. C. A. 4th Cir. Certiorari denied. *W. G. Burnette* for petitioner. *Bryce Rea, Jr.* for respondent. Reported below: 309 F. 2d 678.

No. 767. LEWIS ET UX. *v.* NEW JERSEY EXPRESS CORP. C. A. 3d Cir. Certiorari denied. *Jacob Rassner* for petitioners. *H. Curtis Meanor* for respondent. Reported below: 309 F. 2d 394.

No. 456. WIMAN, WARDEN, *v.* SEALS. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *MacDonald Gallion,* Attorney General of Alabama, and *George D. Mentz,* Assistant Attorney General, for petitioner. *Charles S. Conley, Martin Bradley, Arthur Kinoy* and *Morton Stavis* for respondent. Reported below: 304 F. 2d 53.

No. 563. CHANDLER, U. S. DISTRICT JUDGE, *v.* OCCIDENTAL PETROLEUM CORP. Motion of Earl A. Brown et al., for leave to file brief, as *amici curiae,* granted. Motion to strike respondent's brief and petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE took no part in the consideration or decision of the motions or the petition. *Peyton Ford* for petitioner. *Charles H. Tuttle, Bert Barefoot, Jr.* and *Howard W. Rea* for respondent. *Earl A. Brown* filed a brief for himself and others, as *amici curiae,* in support of the petition. Reported below: 303 F. 2d 55.

No. 437, Misc. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 306 F. 2d 33.

No. 614. PANHANDLE EASTERN PIPE LINE CO. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Robert L. Stern, Joseph J. Daniels, Harry S. Littman* and *Raymond N. Shibley* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Morton Hollander, Kathryn H. Baldwin, Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for the Federal Power Commission; *Aloysius J. Suchy* and *F. Clifton Lind* for the County of Wayne, Michigan; and *Frank J. Kelley,* Attorney General of Michigan, *Eugene Krasicky,* Solicitor General, and *Benjamin F. Gibson* and *Hugh B. Anderson,* Assistant Attorneys General, for Michigan Public Service Commission, respondents. Reported below: 113 U. S. App. D. C. 94, 305 F. 2d 763.

No. 661. MISSISSIPPI ET AL. *v.* MEREDITH. Motion of the United States for leave to be named a party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands,* Assistant Attorney General, and *Thomas H. Watkins, Malcolm B. Montgomery, Garner W. Green, Peter M. Stockett* and *Charles Clark,* Special Assistant Attorneys General, for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 761. HILTON HOTELS CORP. ET AL. *v.* URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Malcolm Anderson* and *Donald C. Bush* for petitioners. Reported below: 309 F. 2d 186.

No. 700. DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT, *v.* HARBOR CARRIERS OF THE PORT OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Arthur Abarbanel* for petitioner. *Roman Beck, Arthur Karger, Maurice A. Krisel* and *Christopher E. Heckman* for Harbor Carriers of the Port of New York et al., and *William J. Hannan* for King et al., respondents. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the National Labor Relations Board. Reported below: 306 F. 2d 89.

No. 7, Misc. DANIEL *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent. Reported below: 292 F. 2d 348.

No. 279, Misc. SPRENZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 304 F. 2d 525.

No. 390, Misc. CLARK *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondents.

No. 553, Misc. BENTHIEM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

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No. 705. FIRST CONGREGATIONAL CHURCH & SOCIETY OF BURLINGTON, IOWA, ET AL. *v.* EVANGELICAL & REFORMED CHURCH ET AL. Motions of R. B. Swartzbaugh and Clark M. Robertson for leave to file briefs, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Kenneth W. Greenawalt, Robert C. C. Heaney* and *Thomas T. Adams* for petitioners. *Paul D. Miller, Loren T. Wood, Orrin G. Judd* and *David W. Peck* for respondents. *R. B. Swartzbaugh* and *Clark M. Robertson*, as *amici curiae*, in support of the petition. Reported below: 305 F. 2d 724.

No. 548, Misc. PRICE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Ralph Olson*, Assistant Attorney General, for respondent.

No. 557, Misc. MILLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 300 F. 2d 760.

No. 569, Misc. RIDLEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 581, Misc. ABREU *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 308 F. 2d 248.

No. 549, Misc. KARIKAS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward L. Carey* and *Walter E. Gillcrist* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 113 U. S. App. D. C. 77, 304 F. 2d 953.

No. 555, Misc. SASSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 574, Misc. SAWYER *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Ralph Olson,* Assistant Attorney General, for respondents. Reported below: 60 Wash. 2d 83, 371 P. 2d 932; 60 Wash. 2d 896, 371 P. 2d 934.

No. 601, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 113 U. S. App. D. C. 233, 307 F. 2d 190.

No. 602, Misc. YOUNG *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States et al.

No. 613, Misc. WHITING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *J. Robert Lunney* for petitioner. Reported below: 308 F. 2d 537.

No. 615, Misc. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 306 F. 2d 317.

No. 634, Misc. EVERITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 303 F. 2d 536.

No. 655, Misc. SCHUETTE *v.* WARDEN, MARYLAND PENITENTIARY. Supreme Bench of Baltimore City, Maryland. Certiorari denied.

No. 656, Misc. DEGROAT *v.* WALLACK, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 667, Misc. MILK *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 669, Misc. DOWTHARD *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Reported below: 92 Ariz. 44, 373 P. 2d 357.

No. 672, Misc. EVERITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 306 F. 2d 839.

No. 657, Misc. KRANTZ *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John E. Bush*, Assistant Attorney General, for respondent. Reported below: 150 Colo. —, 374 P. 2d 199.

No. 679, Misc. GIZZO *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 684, Misc. IN RE LEE. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *George D. Mentz*, Assistant Attorney General, filed a brief for the State of Alabama in opposition.

No. 686, Misc. TABLE *v.* CUNNINGHAM. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 687, Misc. HAWKS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 688, Misc. GAINEY *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied.

No. 703, Misc. HUNTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 731, Misc. PALMER *v.* CUNNINGHAM. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 685, Misc. WALKER *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Everett A. Corten* for respondent Industrial Accident Commission.

No. 691, Misc. BELVIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 303 F. 2d 536.

No. 696, Misc. WAGNON *v.* KANSAS ET AL. Supreme Court of Kansas. Certiorari denied.

No. 697, Misc. CZAJKOWSKI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Thomas A. Livingston* for petitioner.

No. 699, Misc. LINDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 701, Misc. RAY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 702, Misc. EVANS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 215, 181 N. E. 2d 80.

No. 709, Misc. GREENE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 710, Misc. PRYOR *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 361 S. W. 2d 279.

No. 711, Misc. JACKSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 719, Misc. CLARK *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied.

No. 721, Misc. GINGER *v.* CULEHAN, JUDGE, ET AL. Supreme Court of Michigan. Certiorari denied. Reported below: 366 Mich. 675, 116 N. W. 2d 216.

No. 725, Misc. RUARK ET AL. *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 726, Misc. HANOVICH *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondents.

No. 737, Misc. RICH *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 738, Misc. GONZALES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 25 Ill. 2d 235, 184 N. E. 2d 833.

No. 742, Misc. LUGO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 761, Misc. KERSHNER ET AL. *v.* BOLES, WARDEN, ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 937, Misc. LUTON *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. *William Vandercreek* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Sam R. Wilson*, Assistant Attorney General, and *Henry Wade* for respondents. Reported below: 310 F. 2d 445.

No. 747, Misc. HICKOCK *v.* CROUSE, WARDEN. Supreme Court of Kansas. Certiorari denied. *Joseph P. Jenkins* for petitioner. *William M. Ferguson*, Attorney General of Kansas, and *J. Richard Foth* and *Park McGee*, Assistant Attorneys General, for respondent. Reported below: 190 Kan. 224, 373 P. 2d 206.

No. 750, Misc. MOREWITZ, ADMINISTRATRIX, *v.* THE MATADOR ET AL. C. A. 4th Cir. Certiorari denied. *Burt M. Morewitz* for petitioner. *Walter B. Martin, Jr.* for respondents. Reported below: 306 F. 2d 144.

No. 758, Misc. SEALS *v.* WIMAN, WARDEN. C. A. 5th Cir. Certiorari denied. *Charles S. Conley, Martin Bradley, Arthur Kinoy* and *Morton Stavis* for petitioner. Reported below: 304 F. 2d 53.

No. 769, Misc. MORIN *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 806, Misc. MEADOWS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Charles T. Matthews* for respondent.

No. 819, Misc. DARLING *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 690, Misc. HAWKINS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 305 F. 2d 658.

No. 717, Misc. HELLAND *v.* RHAY, PENITENTIARY SUPERINTENDENT. Petition for writ of certiorari to the Supreme Court of Washington and for other relief denied.

*Rehearing Denied.*

No. 437. STOCK *v.* TERRENCE, STATE HOSPITAL DIRECTOR, 371 U. S. 206;

No. 545. JAMIESON *v.* CHICAGO TITLE & TRUST CO. ET AL., 371 U. S. 232;

No. 555. SWALLOW *v.* UNITED STATES, 371 U. S. 950;

No. 558. AERONAUTICAL COMMUNICATIONS EQUIPMENT, INC., *v.* PIERCE, EXECUTRIX, 371 U. S. 954;

No. 568. BATTEN ET AL. *v.* UNITED STATES, 371 U. S. 955;

No. 584. EASTER *v.* DEPARTMENT OF ASSESSMENTS OF BALTIMORE CITY, 371 U. S. 235;

No. 620. LAING *v.* VIRGINIA, 371 U. S. 962; and

No. 452, Misc. NAPIER *v.* UNITED STATES ET AL., 371 U. S. 186. Petitions for rehearing denied.

No. 256. IN RE ESTATE OF HURST, 371 U. S. 862, 931. Motion for leave to file second petition for rehearing denied.

FEBRUARY 22, 1963.

*Certiorari Denied.*

No. 1061, Misc. BATES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Arlo E. Smith*, Chief Assistant Attorney General, for respondent.

*Rehearing Denied.*

No. 743, Misc. MARTIN *v.* KENTUCKY, 371 U. S. 969. Petition for rehearing denied.

FEBRUARY 25, 1963.

*Miscellaneous Orders.*

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL.

IT IS ORDERED that Honorable Walter A. Huxman, United States Senior Judge, be, and he is hereby, appointed Special Master in this case, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to submit such reports as he may deem appropriate.

The master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

The motion of the State of Florida for leave to intervene is hereby referred to the Special Master to hear the parties and report his opinion and recommendation as to whether the motion should be granted.

The motion of the Insurance Company of North America for leave to intervene is denied.

*Richard W. Ervin,* Attorney General of Florida, and *Fred M. Burns,* Assistant Attorney General, for the State of Florida. *Henry A. Frye* for defendant Sun Oil Co., in support of the motion of the State of Florida. *Robert B. Ely III* on the motion of the Insurance Co. of North America. [For earlier orders herein, see 369 U. S. 869; 370 U. S. 929; 371 U. S. 873.]

No. 832, Misc. CORONADO *v.* TAYLOR, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 835, Misc. EX PARTE SCHLETTE. Motion for leave to file petition for writ of habeas corpus denied.

No. 111. FERGUSON, ATTORNEY GENERAL OF KANSAS, ET AL. *v.* SKRUPA, DOING BUSINESS AS CREDIT ADVISORS. Appeal from the United States District Court for the District of Kansas. (Probable jurisdiction noted, 371 U. S. 807.) The motion of National Better Business Bureau, Inc., for leave to file a brief, as *amicus curiae*, is granted. *Wilkie Bushby* and *Joseph Schreiber* on the motion.

No. 146. COLORADO ANTI-DISCRIMINATION COMMISSION ET AL. *v.* CONTINENTAL AIR LINES, INC. Certiorari, 371 U. S. 809, to the Supreme Court of Colorado. The motion of the State of California for leave to argue, as *amicus curiae*, is granted and twenty minutes are allotted for that purpose. Counsel for the respondent is allotted an additional twenty minutes to argue this case. *Stanley Mosk*, Attorney General of California, on the motion.

No. 217. GOSS ET AL. *v.* BOARD OF EDUCATION OF KNOXVILLE, TENNESSEE, ET AL. Certiorari, 371 U. S. 811, to the United States Court of Appeals for the Sixth Circuit. The motion of *Solicitor General Cox*, on behalf of the United States, for leave to participate in the oral argument is granted and fifteen minutes are allotted for that purpose. Counsel for the respondents are allotted an additional fifteen minutes to argue this case.

No. 392. HEAD, DOING BUSINESS AS LEA COUNTY PUBLISHING CO., ET AL. *v.* NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY. Appeal from the Supreme Court of New Mexico. (Probable jurisdiction noted, 371 U. S. 900.) The motion of *Solicitor General Cox*, on behalf of the United States, for leave to participate in the oral argument is granted and thirty minutes are allotted for that purpose. Counsel for the appellee is allotted an additional thirty minutes to argue this case.

No. 563. CHANDLER, U. S. DISTRICT JUDGE, *v.* OCCIDENTAL PETROLEUM CORP. (Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied, *ante*, p. 915.) The orders entered in this case on February 18, 1963, are amended to include the notation that MR. JUSTICE BRENNAN and MR. JUSTICE WHITE took no part in the consideration or decision of the motions or the petition.

No. 739, Misc. H. L. GREEN CO., INC., *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ET AL. Motion for leave to supplement the record granted. Motion for leave to file petition for writ of certiorari or other appropriate writ denied. *Raymond S. Harris* and *Benjamin Spiegel* for petitioner. *Burton H. Brody* for respondent Harris.

*Certiorari Granted.* (*See also No. 690, ante, p. 248; and No. 467, Misc., ante, p. 252.*)

No. 449. FAHY *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari granted. *Francis J. McNamara, Jr., Raymond T. Benedict* and *John F. Spindler* for petitioner. *Lorin W. Willis* for respondent. Reported below: 149 Conn. 577, 183 A. 2d 256.

No. 733. UNITED STATES *v.* STAPF ET AL., EXECUTORS AND TRUSTEES. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Robert N. Anderson* for the United States. *W. M. Sutton* and *H. A. Berry* for respondents. Reported below: 309 F. 2d 592.

*Certiorari Denied.* (*See also No. 708, ante, p. 251.*)

No. 740. BRADBURY ET AL. *v.* DENNIS. C. A. 10th Cir. Certiorari denied. *Fred M. Winner* and *Emory L. O'Connell* for petitioners. Reported below: 310 F. 2d 73.

Nos. 652 and 653. FARBENFABRIKEN BAYER A. G. *v.* STERLING DRUG, INC. C. A. 3d Cir. Certiorari denied. *Thurman Arnold, Milton V. Freeman* and *Edgar H. Brenner* for petitioner. *John T. Cahill, George S. Hills* and *Robert G. Zeller* for respondent. Reported below: 307 F. 2d 207, 210.

No. 725. DURGIN ET UX. *v.* STOFFEL. Supreme Court of Florida. Certiorari denied.

No. 731. IVEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *J. C. B. Ehringhaus, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 310 F. 2d 227.

No. 734. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Myer H. Gladstone* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 309 F. 2d 735.

No. 735. NORTH TEXAS PRODUCERS ASSOCIATION *v.* YOUNG. C. A. 5th Cir. Certiorari denied. *Ashton Phelps* for petitioner. *Logan Ford* for respondent. Reported below: 308 F. 2d 235.

No. 736. DAVID *v.* CLOUSER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondents. Reported below: 114 U. S. App. D. C. 12, 309 F. 2d 233.

No. 567, Misc. MCGANN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 739. MAY *v.* CHASE MANHATTAN BANK. C. A. 3d Cir. Certiorari denied. *Landon Gerald Dowdey* for petitioner. *David B. Buerger* for respondent. Reported below: 311 F. 2d 117.

No. 750. PHILLIPS PIPE LINE CO. *v.* BELUSKO ET AL. C. A. 7th Cir. Certiorari denied. *Joseph H. Hinshaw* for petitioner. *Lee William Ensel* for respondents. Reported below: 308 F. 2d 832.

No. 751. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* KOSOWATZ, ADMINISTRATRIX. Court of Appeals of Ohio, Cuyahoga County. Certiorari denied. *Edwin Knachel* and *John G. Cardinal* for petitioner. *George J. McMonagle* and *Richard E. McMonagle* for respondent.

No. 766. BOWEN-ITCO, INC., ET AL. *v.* HOUSTON ENGINEERS, INC. C. A. 5th Cir. Certiorari denied. *Earl Babcock* and *B. R. Pravel* for petitioners. *James B. Simms* for respondent. Reported below: 310 F. 2d 522.

No. 778. POTUCEK, TRUSTEE IN BANKRUPTCY, *v.* CORDELERIA LOURDES ET AL. C. A. 10th Cir. Certiorari denied. *Malcolm Miller* for petitioner. *Dale M. Stucky* for respondents. Reported below: 310 F. 2d 527.

No. 532, Misc. SUTTON *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent. Reported below: 302 F. 2d 286.

No. 683, Misc. MAHURIN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 756, Misc. PIERCE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 735, Misc. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 760, Misc. HOLLEY *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 762, Misc. BARNES *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 763, Misc. BALL *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 764, Misc. ARKETA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 784, Misc. LEWIS *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 802, Misc. ALTHOFF *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 787, Misc. HOGE *v.* BOLSINGER, PROTHONOTARY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 311 F. 2d 215.

No. 804, Misc. BROWN *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John E. Bush*, Assistant Attorney General, for respondent. Reported below: 151 Colo. —, 375 P. 2d 675.

*Rehearing Denied.* (*See also No. 479, ante, p. 246.*)

No. 472. OVE GUSTAVSSON CONTRACTING CO., INC., *v.* BROWNE & BRYAN LUMBER CO., INC., ET AL., 371 U. S. 942;

No. 597. WIGHT ET AL. *v.* MONTANA-DAKOTA UTILITIES CO., 371 U. S. 962;

No. 627. AEROVIAS INTERAMERICANAS DE PANAMA, S. A., ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, 371 U. S. 961; and

No. 359, Misc. ODELL *v.* BURKE, WARDEN, 371 U. S. 963. Petitions for rehearing denied.

No. 566, Misc. MARTINEZ *v.* UNITED STATES, 371 U. S. 969. After consideration of petitioner's reply brief, petition for rehearing denied.

No. 528. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, *v.* MONOLITH PORTLAND CEMENT CO., 371 U. S. 537. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

MARCH 4, 1963.

*Miscellaneous Orders.*

No. 368. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL. *v.* SCHERMERHORN ET AL. Certiorari, 371 U. S. 909, to the Supreme Court of Florida; and

No. 404. NATIONAL LABOR RELATIONS BOARD *v.* GENERAL MOTORS CORP. Certiorari, 371 U. S. 908, to the United States Court of Appeals for the Sixth Circuit. The motion of American Federation of Labor et al. for leave to file a brief, as *amici curiae,* is granted. The motion of American Federation of Labor et al. for leave to argue, as *amici curiae,* is denied. MR. JUSTICE GOLD-

BERG took no part in the consideration or decision of these motions. *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine, Thomas E. Harris, Joseph L. Rauh, Jr., John Silard* and *Harold A. Cranefield* on the motions. *Bernard B. Weksler* for respondents in No. 368 in opposition to the motion for leave to argue as *amici curiae*.

No. 464. UNITED STATES *v.* MUNIZ ET AL. Certiorari, 371 U. S. 919, to the United States Court of Appeals for the Second Circuit. The motion of respondents to remove the case from the summary calendar is granted. *John J. Abt* on the motion. *Solicitor General Cox* filed a memorandum for the United States in response to the motion.

No. 690, Misc. HAWKINS *v.* UNITED STATES. (Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and for other relief denied, *ante*, p. 924.) The application to recall order denying petition for writ of certiorari and for other relief presented to MR. JUSTICE BLACK, and by him referred to the Court, is denied.

No. 729, Misc. DITSON *v.* CALIFORNIA, 371 U. S. 541. Upon petition by the State of California for rehearing or clarification, the opinion of this Court entered on January 14, 1963, in this case is withdrawn and, upon the prior suggestion of mootness, the petition for writ of certiorari to the Supreme Court of California is dismissed.

*Certiorari Granted.* (*See also No. 730, ante, p. 284.*)

No. 641. MEEKER ET UX. *v.* AMBASSADOR OIL CORP. C. A. 10th Cir. Certiorari granted. *R. F. Deacon Arledge* for petitioners. *Vivian Diffendaffer* for respondent. Reported below: 308 F. 2d 875.

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No. 757. MEYER *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Samuel W. Sherman* and *Martin A. Gettinger* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 309 F. 2d 131.

*Certiorari Denied.*

No. 654. AETNA CASUALTY & SURETY CO. ET AL. *v.* VINSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *M. S. Mazzuchi* for petitioners. *Martin E. Gerel* for respondents. Reported below: 113 U. S. App. D. C. 246, 307 F. 2d 387.

No. 678. BLACK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Don O. Russell* and *Tyree C. Derrick* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 309 F. 2d 331.

No. 681. HARRISON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Leon O'Quin* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 304 F. 2d 835.

No. 749. BEATTY SAFWAY SCAFFOLD CO. *v.* UP-RIGHT, INC. C. A. 9th Cir. Certiorari denied. *Henry Gifford Hardy* for petitioner. *Oscar A. Mellin* for respondent. Reported below: 306 F. 2d 626.

No. 752. BRADFORD ET AL. *v.* MAGGIORE ET AL. C. A. 6th Cir. Certiorari denied. *William Waller* and *Cecil Sims* for petitioners. *Z. T. Osborn, Jr.* and *E. J. Walsh* for respondents. Reported below: 310 F. 2d 519.

No. 743. STIRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter* and *Vincent M. Casey* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 311 F. 2d 277.

No. 753. WESTINGHOUSE BROADCASTING CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Albert R. Connelly, George G. Tyler* and *Leonard E. Kust* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 309 F. 2d 279.

No. 754. BOYLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Sidney Teiser* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 310 F. 2d 493.

No. 755. MITCHELL, DOING BUSINESS AS LASALLE COUNTY LIVESTOCK MARKETING CENTER, *v.* FREEMAN, SECRETARY OF AGRICULTURE. C. A. 7th Cir. Certiorari denied. *Andrew J. O'Conor* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent. Reported below: 308 F. 2d 855.

No. 756. WHITING ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *T. Emmett McKenzie* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 311 F. 2d 191.

No. 758. IN RE NOVARRO. Supreme Court of California. Certiorari denied. *John N. Frolich* and *Linus R. Fike* for petitioner. *Roger Arnebergh, Philip E. Grey, Wm. E. Doran* and *Charles W. Sullivan* for the State of California.

No. 759. MAESTAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Walter L. Gerash* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 311 F. 2d 457.

No. 763. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Walter E. Alessandroni,* Attorney General of Pennsylvania, *Miles Warner* and *William A. Goichman* for petitioner. *W. Bradley Ward, Edward W. Mullinix, Henry W. Sawyer III, Charles A. Wolfe, Joseph W. Swain, Jr., W. Wilson White* and *Philip H. Strubing* for respondents. Reported below: 308 F. 2d 856.

No. 769. DAKOTA ELECTRIC SUPPLY CO. *v.* ST. PAUL FIRE & MARINE INSURANCE CO. C. A. 8th Cir. Certiorari denied. *Philip B. Vogel* for petitioner. *Benedict Deinard* for respondent. Reported below: 309 F. 2d 22.

No. 780. CHERETON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *O. B. Cline, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 309 F. 2d 197.

No. 830. HUMBLE OIL & REFINING CO. *v.* CUTRER ET AL. C. A. 5th Cir. Certiorari denied. *Charles Janvier* and *H. H. Hillyer, Jr.* for petitioner. Reported below: 309 F. 2d 752.

No. 141. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO, *v.* SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Herman E. Cooper* and *H. Howard Ostrin* for petitioner. *Charles S. Rhyne, Brice W. Rhyne* and *Thomas P. Brown III* for respondents. Reported below: See 201 F. Supp. 82.

No. 412, Misc. WALLACE *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Andrew J. Goodwin,* Assistant Attorneys General, for respondent.

No. 424, Misc. HOLT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 609, Misc. REIFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 299 F. 2d 366.

No. 705, Misc. MAUGERE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 727, Misc. PEARCE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 733, Misc. TUNNELL *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 774, Misc. COTHRAN *v.* SAN JOSE WATER WORKS. Supreme Court of California. Certiorari denied. Reported below: 58 Cal. 2d 608, 375 P. 2d 449.

No. 781, Misc. REAM *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Supreme Court of Washington. Certiorari denied.

No. 826, Misc. MILLINGTON *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 895, Misc. STEVENSON *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 147 W. Va. —, 127 S. E. 2d 638.

No. 904, Misc. GLINTON *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *Nancy Carley* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 309 F. 2d 543.

*Rehearing Denied.*

No. 607. MISSOURI EX REL. JOHNSON, ADMINISTRATRIX, ET AL. *v.* CLAY, SUPERINTENDENT OF DIVISION OF INSURANCE, ET AL., 371 U. S. 577. Petition for rehearing denied.

MARCH 18, 1963.

*Miscellaneous Orders.*

No. 480. MCNEESE ET AL. *v.* BOARD OF EDUCATION FOR SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, ET AL. Certiorari, 371 U. S. 933, to the United States Court of Appeals for the Seventh Circuit. The motion of the American Civil Liberties Union for leave to file a brief, as *amicus curiae*, is granted. *Alex Elson* on the motion.

No. 392. HEAD, DOING BUSINESS AS LEA COUNTY PUBLISHING CO., ET AL. *v.* NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY. Appeal from the Supreme Court of New Mexico. (Probable jurisdiction noted, 371 U. S. 900.) The motion of the American Optometric Association, Inc., for leave to file a brief, as *amicus curiae*, is granted. *Ellis Lyons, Leonard J. Emmerglick* and *Harold Kohn* on the motion.

No. 797. DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL. *v.* MANN ET AL. On appeal from the United States District Court for the Eastern District of Virginia. The motion of appellees Mann et al. to vacate stay or in the alternative to advance, is denied. The motion of appellees Glanville et al. to vacate stay, is denied. *Edmund D. Campbell* and *E. A. Prichard* on the motion for Mann et al. *Henry E. Howell, Jr.* and *Sidney H. Kelsey* on the motion for Glanville et al.

No. 854, Misc. SMITH *v.* TAYLOR, WARDEN;
No. 870, Misc. DRAPER ET AL. *v.* WASHINGTON ET AL.;
No. 886, Misc. RODRIGUEZ *v.* NEW YORK;
No. 924, Misc. THOMAS *v.* UNITED STATES;
No. 947, Misc. MOORE *v.* UNITED STATES; and
No. 962, Misc. SCHACHEL *v.* STEVENS, WARDEN, ET AL.
Motions for leave to file petitions for writs of habeas corpus denied.

No. 877, Misc. KNICKER *v.* SUPREME COURT OF MISSOURI. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

*Probable Jurisdiction Noted.*

No. 601. POLAR ICE CREAM & CREAMERY CO. *v.* ANDREWS ET AL., CONSTITUTING THE FLORIDA MILK COMMISSION. Appeal from the United States District Court

for the Northern District of Florida. Probable jurisdiction noted. *Joe J. Harrell* and *J. A. McClain, Jr.* for appellant. *Richard W. Ervin,* Attorney General of Florida, and *Joseph C. Jacobs,* Assistant Attorney General, for appellees. Reported below: 208 F. Supp. 899.

No. 566. FIELDS ET AL. *v.* CITY OF FAIRFIELD. Appeal from the Supreme Court of Alabama. Probable jurisdiction noted. The Solicitor General is invited to file a brief expressing the views of the United States. *Melvin L. Wulf* and *Charles Morgan, Jr.* for appellants. *Frank B. Parsons* for appellee. Reported below: 273 Ala. 588, 143 So. 2d 177.

*Certiorari Granted.* (*See No. 399, ante, p. 522, and No. 425, Misc., ante, p. 527.*)

*Certiorari Denied.* (*See also No. 841, Misc., ante, p. 521.*)

No. 665. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF PUERTO RICO *v.* NOGUERA, SECRETARY OF THE TREASURY OF PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *Walter L. Newsom, Jr.* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, and *Americo Serra,* Assistant Solicitor General, for respondent. Reported below: — P. R. —.

No. 702. CENTRAL FEDERAL SAVINGS & LOAN ASSOCIATION OF PUERTO RICO *v.* NOGUERA, SECRETARY OF THE TREASURY OF PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *Walter L. Newsom, Jr.* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, and *Americo Serra,* Assistant Solicitor General, for respondent. Reported below: — P. R. —.

No. 666. CALIFORNIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Stanley Mosk*, Attorney General of California, and *John Fourt* and *Robert H. Connett*, Deputy Attorneys General, for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 307 F. 2d 941.

No. 723. MEL DAR CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Joseph T. Enright* and *Norman Elliott* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Carolyn R. Just* for respondent. Reported below: 309 F. 2d 525.

No. 772. BLACHMAN *v.* ERIEVIEW CORPORATION ET AL. C. A. 6th Cir. Certiorari denied. *Harry A. Blachman*, petitioner, *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for the United States et al., *John Eckler* for Erieview Corporation, and *Joseph H. Crowley* for the City of Cleveland, respondents. Reported below: 311 F. 2d 85.

No. 773. HONIGMAN *v.* GREEN GIANT CO. ET AL. C. A. 8th Cir. Certiorari denied. *John Sklar* for petitioner. *Fremont C. Fletcher* for respondents. Reported below: 309 F. 2d 667.

No. 782. OREGON, ACTING BY AND THROUGH ITS STATE FORESTER, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert Y. Thornton*, Attorney General of Oregon, and *Thomas C. Stacer* and *Clarence R. Kruger*, Assistant Attorneys General, for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 308 F. 2d 568.

No. 785. GREENE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 786. NICOLETTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* and *Wm. Scott Stewart* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 310 F. 2d 359.

No. 787. INDEMNITY INSURANCE CO. OF NORTH AMERICA, INC., ET AL. *v.* AMERICAN FIDELITY & CASUALTY CO., INC. C. A. 6th Cir. Certiorari denied. *Peter J. Donahue* for petitioners. *Maurice J. Leen, Jr.* for respondent. Reported below: 308 F. 2d 697.

No. 788. KEYSTONE COAT & APRON MFG. CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edwin J. McDermott* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: — Ct. Cl. —.

No. 796. TECHNICAL TAPE CORP. *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. *Truman S. Safford* for petitioner. *Edward A. Haight* and *Harold J. Kinney* for respondent. Reported below: 309 F. 2d 55.

No. 806. BATESVILLE CASKET CO., INC., *v.* JACWIL MFRS. C. A. 7th Cir. Certiorari denied. *Thomas M. Scanlon, Edmund P. Wood* and *William G. Konold* for petitioner. *Patrick H. Hume* for respondent. Reported below: 311 F. 2d 38.

No. 794. AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.) ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. *Carl Slater* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Helen F. Humphrey* and *Quentin O. Young* for Lithographers & Printers National Association, Inc., et al., respondents. Reported below: 309 F. 2d 31.

No. 798. YORK *v.* FLORIDA SOUTHERN CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Charles R. Vickery, Jr.* for petitioner. *Solicitor General Cox, Peter A. Dammann* and *David Ferber* for the Securities and Exchange Commission, and *John W. Prunty* for the trustee, respondents. Reported below: 310 F. 2d 109.

No. 802. TROTTER ET AL. *v.* AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1303, ET AL. C. A. 6th Cir. Certiorari denied. *Dee Edwards* for petitioners. *Bernard Cushman* and *Ralph W. Cole* for respondents. Reported below: 309 F. 2d 584.

No. 811. F. W. WOOLWORTH CO. *v.* MEIS, TRUSTEE. C. A. 7th Cir. Certiorari denied. *Anan Raymond* for petitioner. *Horace E. Gunn* for respondent. Reported below: 310 F. 2d 350.

No. 817. WARRINER *v.* FINK ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *James Lawrence King* for respondents. Reported below: 307 F. 2d 933.

No. 831. GENERAL ELECTRIC CO. ET AL. *v.* KIRKPATRICK. C. A. 3d Cir. Certiorari denied. *Henry W. Sawyer III* and *Lewis H. Van Dusen, Jr.* for petitioners. *Harold E. Kohn* and *Aaron M. Fine* for respondent.

No. 862. UNITED STATES *v.* MOORE-McCORMACK LINES, INC., ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. *J. Franklin Fort, Frank B. Ober* and *T. S. L. Perlman* for respondents. Reported below: 308 F. 2d 866.

No. 704. MARCUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *William B. Sleigh, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 310 F. 2d 143.

No. 722. WAREHOUSEMEN, TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION No. 542 *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY, ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Walter Wencke* for petitioner. *William Hillyer* for respondent Alfred M. Lewis, Inc.

No. 770. WISE *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *John C. Melaniphy, Charles S. Rhyne* and *Sydney R. Drebin* for respondents. Reported below: 308 F. 2d 364.

No. 789. LOCAL 2 OF THE OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSN. ET AL. *v.* PARAMOUNT PLASTERERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Martin F. O'Donoghue* and *Patrick C. O'Donoghue* for petitioners. *Earl Klein* for respondents. Reported below: 310 F. 2d 179.

No. 776. FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL–CIO, *v.* EASTERN AIR LINES, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *I. J. Gromfine* and *Herman Sternstein* for petitioner. *Burton A. Zorn, Marvin E. Frankel, William Roth* and *W. Glen Harlan* for respondent. Reported below: 307 F. 2d 510.

No. 603, Misc. HYDE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *L. Robert Evans* and *Harris James George* for petitioner. Reported below: 228 Md. 209, 179 A. 2d 421.

No. 665, Misc. HEATH ET AL. *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 4th Cir. Certiorari denied. *John Bolt Culbertson* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for respondent. Reported below: 307 F. 2d 348; 307 F. 2d 840; 307 F. 2d 518; 307 F. 2d 379; 298 F. 2d 855.

No. 678, Misc. WOLFE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 307 F. 2d 798.

No. 732, Misc. COMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for the United States.

No. 776, Misc. DELANEY *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 232 Ore. 306, 374 P. 2d 746.

No. 734, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 748, Misc. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Andrew P. Carter* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 309 F. 2d 127.

No. 789, Misc. SHOEMAKE *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 790, Misc. BURTON *v.* DAVIS, WARDEN. Court of Appeals of Kentucky. Certiorari denied.

No. 798, Misc. STAFFORD *v.* RUSSELL ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 201 Cal. App. 2d 719, 20 Cal. Rptr. 112.

No. 801, Misc. LEEK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 526, 184 A. 2d 808.

No. 805, Misc. REED *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 809, Misc. BENTLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 310 F. 2d 685.

No. 808, Misc. UNDERWOOD *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 812, Misc. LOHRKE *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 813, Misc. RODRIGUEZ *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 814, Misc. HILL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 815, Misc. ROOT *v.* CUNNINGHAM. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 816, Misc. LYMORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 25 Ill. 2d 305, 185 N. E. 2d 158.

No. 817, Misc. LUSTERINO *v.* NEW YORK. Supreme Court of New York, New York County. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 821, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 822, Misc. OTTO *v.* LAUER. Supreme Court of Ohio. Certiorari denied.

No. 825, Misc. CARSON *v.* CUNNINGHAM. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 831, Misc. DeLucia *v.* Yeager, Warden. Supreme Court of New Jersey. Certiorari denied.

No. 837, Misc. Hill *v.* Beto, Corrections Director. Court of Criminal Appeals of Texas. Certiorari denied.

No. 845, Misc. Otto *v.* Somers, Mayor of the City of Dayton, Ohio, et al. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Joseph P. Duffy* for respondents.

No. 846, Misc. Carafas et vir *v.* New York. Court of Appeals of New York. Certiorari denied. Reported below: 11 N. Y. 2d 969, 183 N. E. 2d 697.

No. 847, Misc. Hawkins *v.* Maryland. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 442, 184 A. 2d 626.

No. 851, Misc. Smith *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 861, Misc. Doty *v.* Johnson, Wright County District Court Clerk. Supreme Court of Iowa. Certiorari denied.

No. 868, Misc. Brengettsy *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *Edward Brodkey* for petitioner. Reported below: 25 Ill. 2d 228, 184 N. E. 2d 849.

No. 875, Misc. Beckett *v.* Boles, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 866, Misc. BURRIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 879, Misc. SCHMIDT *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 891, Misc. EDMONDSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 66, 185 A. 2d 497.

No. 755, Misc. SHARROW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 309 F. 2d 77.

No. 858, Misc. MALORY *v.* MCGETTRICK, SHERIFF OF CUYAHOGA COUNTY, OHIO. Motion of the National Lawyers Guild for leave to file a brief, as *amicus curiae*, granted. Motion of the American Civil Liberties Union et al. for leave to file a brief, as *amici curiae*, granted. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Walter S. Haffner* for petitioner. *John T. Corrigan* and *Harvey R. Monck* for respondent. *T. W. Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Assistant Attorney General, for the State of North Carolina, as *amicus curiae*, in opposition. *Norman Leonard* for the National Lawyers Guild, as *amicus curiae*, in support of the petition. *Melvin L. Wulf* and *Ralph Rudd* for the American Civil Liberties Union et al., as *amici curiae*, in support of the petition. Reported below: 173 Ohio St. 536, 184 N. E. 2d 209.

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No. 881, Misc. LOUCKS *v.* RANDOLPH, WARDEN. Circuit Court of Cook County, Illinois. Certiorari denied.

*Rehearing Denied.*

No. 747, October Term, 1961. SHAW WAREHOUSE CO. ET AL. *v.* SOUTHERN RAILWAY CO. ET AL., 369 U. S. 850. Petition for rehearing denied. MR. JUSTICE BLACK, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application.

No. 16. SHOTWELL MANUFACTURING CO. ET AL. *v.* UNITED STATES, 371 U. S. 341;

No. 483. JOHN J. CASALE, INC., *v.* UNITED STATES ET AL., 371 U. S. 222;

No. 543. STUART ET AL. *v.* CARR (FORMERLY WILSON), ATTORNEY GENERAL OF TEXAS, ET AL., 371 U. S. 576;

No. 616. MILLER *v.* UDALL, SECRETARY OF THE INTERIOR, 371 U. S. 967;

No. 7, Misc. DANIEL *v.* WILKINS, WARDEN, *ante*, p. 917;

No. 581, Misc. ABREU *v.* UNITED STATES, *ante*, p. 918; and

No. 690, Misc. HAWKINS *v.* UNITED STATES, *ante*, pp. 924, 933. Petitions for rehearing denied.

MARCH 19, 1963.

*Dismissal Under Rule 60.*

No. 586. JACKSON *v.* UNITED STATES. Certiorari, 371 U. S. 900, to the Court of Claims. Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Charles D. Ablard* and *Bernard D. Craig* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Douglas, Louis F. Claiborne* and *Alan S. Rosenthal* for the United States. Reported below: — Ct. Cl. —, 297 F. 2d 939.

MARCH 21, 1963.

*Dismissals Under Rule 60.*

No. 760. LAUDATE *v.* MASSACHUSETTS. On petition for writ of certiorari to the Supreme Judicial Court of Massachusetts. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Paul T. Smith* for petitioner. *Edward W. Brooke,* Attorney General of Massachusetts, for respondent. Reported below: 345 Mass. 169, 186 N. E. 2d 598.

No. 1017, Misc. WOLFSON *v.* NEW YORK. On petition for writ of certiorari to the Court of Appeals of New York. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

No. 1047, Misc. GREEN *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 313 F. 2d 6.

MARCH 25, 1963.

*Miscellaneous Orders.*

No. ——. FLORA CONSTRUCTION CO. ET AL., DOING BUSINESS AS FLORA & ARGUS CONSTRUCTION CO., *v.* NATIONAL LABOR RELATIONS BOARD. The motion of the appellant for leave to proceed *in forma pauperis* is denied.

No. 956, Misc. THOMAS ET UX. *v.* RANDOLPH, WARDEN, ET AL.;

No. 970, Misc. DODGE ET AL. *v.* EYMAN, WARDEN; and

No. 974, Misc. LATTIN *v.* COX, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

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No. 368. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL. *v.* SCHERMERHORN ET AL. Certiorari, 371 U. S. 909, to the Supreme Court of Florida. The motion of the Chamber of Commerce of the United States for leave to file a brief, as *amicus curiae*, is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *William B. Barton* and *Harry J. Lambeth* on the motion.

*Probable Jurisdiction Noted.*

No. 791. UNITED STATES ET AL. *v.* J. B. MONTGOMERY, INC. Appeal from the United States District Court for the District of Colorado. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Elliott H. Moyer* and *Robert W. Ginnane* for the United States et al. *Charles W. Singer* for appellee. Reported below: 206 F. Supp. 455.

*Certiorari Granted.* (*See Nos. 55 and 64, ante, p. 591, and No. 415, Misc., ante, p. 596.*)

*Certiorari Denied.* (*See also Misc. Nos. 956, 970 and 974, supra.*)

No. 777. FRANKLIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for respondent. Reported below: 58 Cal. 2d 304, 373 P. 2d 867.

No. 800. ADAMS, DOING BUSINESS AS BEACON HILL CO., ET AL. *v.* HIRSCH ET AL., DOING BUSINESS AS BELAND REALTY CO. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. *O. John Rogge* and *Martin Rosen* for petitioners. *Seymour Shainswit* and *Leonard W. Wagman* for respondents. Reported below: See 29 Misc. 2d 641, 214 N. Y. S. 2d 796.

No. 804. BORDEN COMPANY *v.* LIDDY, SECRETARY OF AGRICULTURE OF IOWA. C. A. 8th Cir. Certiorari denied. *Maxwell A. O'Brien* for petitioner. Reported below: 309 F. 2d 871.

No. 805. FIRST NATIONAL BANK OF MEMPHIS *v.* AETNA CASUALTY & SURETY CO. C. A. 6th Cir. Certiorari denied. *Longstreet Heiskell* for petitioner. *Cooper Turner, Jr.* and *Elmer W. Beasley* for respondent. Reported below: 309 F. 2d 702.

No. 807. SKOLNICK *v.* MARTIN ET AL. Supreme Court of Illinois. Certiorari denied. *Peter S. Sarelas* for petitioner. *Walter T. Fisher* for respondents.

No. 810. WYOMING ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *W. M. Haight,* Deputy Attorney General of Wyoming, for the State of Wyoming, and *Wm. J. DeMartini* for Richfield Oil Corp., petitioners. *Solicitor General Cox, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 310 F. 2d 566.

No. 816. PEEKE, ADMINISTRATRIX, *v.* ENOCH ET VIR. Supreme Court of Illinois or Appellate Court of Illinois, First District. Certiorari denied. *Hugh M. Matchett, Charles V. Falkenberg* and *Charles V. Falkenberg, Jr.* for petitioner. *H. Blair White* and *George W. McBurney* for respondents. Reported below: See 34 Ill. App. 2d 130, 180 N. E. 2d 740.

No. 820. MINKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* and *Leon H. Kline* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 312 F. 2d 632.

No. 843. BAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 310 F. 2d 924.

No. 380. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* RUTLAND RAILWAY CORP. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Harold N. McLaughlin, Harold C. Heiss, V. C. Shuttleworth* and *Wayland K. Sullivan* for petitioners. *Donald L. Wallace* and *Thomas Wm. Lynch* for respondent. Reported below: 307 F. 2d 21.

No. 707. GEE ET AL. *v.* STRACHAN SHIPPING CO. ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *W. Arthur Combs* for petitioners. *C. A. Brown* for respondents. Reported below: 306 F. 2d 693.

No. 713. ALLEGRUCCI *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied for the reason that the petition was not timely filed. *Michael von Moschzisker* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 309 F. 2d 934.

No. 867, Misc. RICHARDSON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. *Michael D. Konomos* for petitioner. Reported below: 347 S. W. 2d 165.

No. 749, Misc. ROSOTO ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for respondent. Reported below: 58 Cal. 2d 304, 373 P. 2d 867.

No. 878, Misc. TUCKER *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Paul D. Welker* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Lyle Reid,* Assistant Attorney General, for respondent. Reported below: 210 Tenn. 646, 361 S. W. 2d 494.

No. 880, Misc. SIMONETTI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 915, Misc. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 303 F. 2d 647.

No. 920, Misc. LESSARD *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 933, Misc. ELKSNIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner.

No. 967, Misc. GOLSTON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Al Matthews* for petitioner. Reported below: 58 Cal. 2d 535, 375 P. 2d 51.

No. 714, Misc. CASTLE *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 304 F. 2d 871.

*Rehearing Denied.*

No. 611. PUBLIC UTILITY DISTRICT NO 1, PEND OREILLE COUNTY, WASHINGTON, *v.* FEDERAL POWER COMMISSION ET AL., *ante*, p. 908; and

No. 696. DRILL *v.* UNITED STATES, *ante*, p. 912. Petitions for rehearing denied.

No. 135, October Term, 1959. DEMPSTER ET AL. *v.* UNITED STATES, 361 U. S. 819. Motion for leave to file petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

MARCH 29, 1963.

*Certiorari Denied.*

No. 1293, Misc. ASHLEY ET AL. *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Lloyd M. Lunsford* and *Clyde W. Woody* for petitioners. Reported below: 362 S. W. 2d 847.

APRIL 1, 1963.

*Miscellaneous Orders.*

No. 631. CAMPBELL ET AL. *v.* UNITED STATES. Certiorari, 371 U. S. 919, to the United States Court of Appeals for the First Circuit. The motion of the respondent to remove the case from the summary calendar is granted. *Solicitor General Cox* on the motion.

No. 403. BANCO NACIONAL DE CUBA *v.* SABBATINO, RECEIVER, ET AL. Certiorari, *ante*, p. 905, to the United States Court of Appeals for the Second Circuit. The motion of Pan-American Life Insurance Co. for leave to be heard as *amicus curiae* is granted to permit the filing of a brief but not to permit the presentation of oral argument. *James A. Dixon* on the motion.

*Certiorari Granted.*

No. 485. CAREY, PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, *v.* WESTINGHOUSE ELECTRIC CORP. The petition for writ of certiorari to the Court of Appeals of New York is granted limited to Question 1 presented by the petition which reads as follows:

"Whether a state court is pre-empted of its jurisdiction to enforce arbitration provisions of a collective bargaining agreement by compelling arbitration of a grievance alleging that the employer violated the agreement by assigning work covered by the agreement to employees outside the collective bargaining unit and refusing to apply the terms and provisions of the agreement to the performance of such work."

The Solicitor General is invited to file a brief, as *amicus curiae*, expressing the views of the United States. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Benjamin C. Sigal, David S. Davidson* and *Isadore Katz* for petitioner. *John D. Calhoun* and *John F. Hunt, Jr.* for respondent. Reported below: 11 N. Y. 2d 452, 184 N. E. 2d 298.

No. 673. GOTTHILF *v.* SILLS ET AL. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari granted. *O. John Rogge* for petitioner. *Rose Rothenberg* for respondents.

No. 808. FEDERAL POWER COMMISSION *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL.; and

No. 822. CITY OF COLTON *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL. Petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit granted. The cases are consolidated and a total of two hours is allowed for oral argument. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Morton Hollander, Richard A. Solomon, Howard E. Wahrenbrock, Thomas M. Debevoise* and *Peter H. Schiff* for petitioner in No. 808. *John W. Cragun* and *Reuben Goldberg* for petitioner in No. 822. *Harry W. Sturges, Jr.* and *Boris H. Lakusta* for Southern California Edison Co., and *J. Thomason Phelps* for Public Utilities Commission of California, respondents. Reported below: 310 F. 2d 784.

No. 833. ARO MANUFACTURING CO., INC., ET AL. *v.* CONVERTIBLE TOP REPLACEMENT CO., INC. Motion to use the record in *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, No. 21, October Term, 1960 (365 U. S. 336), granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted. *David Wolf* and *Charles Hieken* for petitioners. *Elliott I. Pollock* for respondent. Reported below: 312 F. 2d 52.

*Certiorari Denied.*

No. 818. UNIVERSAL FILM EXCHANGES, INC., ET AL. *v.* BOARD OF FINANCE AND REVENUE. Supreme Court of Pennsylvania. Certiorari denied. *Wm. A. Schnader* and *Samuel D. Slade* for petitioners. *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *George W. Keitel* and *Edward T. Baker,* Deputy Attorneys General, for respondent. Reported below: 409 Pa. 180, 185 A. 2d 542.

No. 646. BROWN *v.* SMITH, WARDEN. C. A. 2d Cir. Certiorari denied. *John S. Burgess* and *Thurman Arnold* for petitioner. *Charles J. Adams*, Attorney General of Vermont, and *Thomas M. Debevoise* for respondent. Reported below: 306 F. 2d 596.

No. 726. GUIPPONE *v.* UNITED STATES;
No. 727. PALMIERI *v.* UNITED STATES;
No. 728. SCHIFFMAN *v.* UNITED STATES;
No. 729. TANDLER *v.* UNITED STATES;
No. 791, Misc. PORCELLI *v.* UNITED STATES;
No. 899, Misc. SCOPELLITTI *v.* UNITED STATES; and
No. 948, Misc. AGUECI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Krieger* for petitioners in Nos. 726 and 727. *Albert J. Krieger* for petitioners in Nos. 728 and 729. Petitioners *pro se* in Misc. Nos. 791, 899 and 948. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 310 F. 2d 817.

No. 771. DUDLEY ET AL. *v.* ORANGE COUNTY, FLORIDA. Supreme Court of Florida. Certiorari denied. *Johnie A. McLeod*, for petitioners. *David W. Hedrick* for respondent. Reported below: 146 So. 2d 379.

No. 813. BAWDEN *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 208 Cal. App. 2d 589, 25 Cal. Rptr. 368.

No. 819. MISANI *v.* ORTHO PHARMACEUTICAL CORP. ET AL. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Clyde A. Szuch* and *Stanley C. Smoyer* for respondents.

No. 815. EUGE *v.* MISSOURI. St. Louis Court of Appeals of Missouri. Certiorari denied. Reported below: 359 S. W. 2d 369.

No. 825. DUDGEON, DOING BUSINESS AS ALL STATES DRIVE-AWAYS AGENCY, ET AL. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 9th Cir. Certiorari denied. *Edwin P. Rome* and *Goncer M. Krestal* for petitioners. *Solicitor General Cox, Robert W. Ginnane* and *Bernard A. Gould* for respondent.

No. 826. ALBAUGH *v.* ROBERTS, CLERK, U. S. HOUSE OF REPRESENTATIVES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Morton Hollander* for respondent.

No. 1010, Misc. BROWN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 799. WILLARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Hayden C. Covington* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 312 F. 2d 605.

*Rehearing Denied.*

No. 62. NORTHERN NATURAL GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS, *ante*, p. 84. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

No. 18. UNITED STATES *v.* NATIONAL DAIRY PRODUCTS CORP. ET AL., *ante*, p. 29;

No. 629. HAUSFELD *v.* ZIEGLER, *ante*, p. 907;

No. 711. NATIONAL BULK CARRIERS, INC., ET AL. *v.* GARDNER, ADMINISTRATRIX, *ante*, p. 913;

No. 721. MAY *v.* PENNSYLVANIA RAILROAD CO., *ante*, p. 914; and

No. 685, Misc. WALKER *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL., *ante*, p. 922. Petitions for rehearing denied.

No. 294, Misc. MULLER *v.* NEW YORK, 371 U. S. 850. Motion for leave to file petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

APRIL 12, 1963.

*Dismissal Under Rule 60.*

No. 910. AMERICAN STATES INSURANCE CO. *v.* CRANE SUPPLY CO. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *John P. Sandidge* for petitioner. *Wilbur Fields* for respondent. Reported below: 310 F. 2d 712.

APRIL 15, 1963.

*Miscellaneous Orders.*

No. 34. DOUGLAS ET AL. *v.* CALIFORNIA, *ante*, p. 353. The motion for allowance of attorney's transportation expenses is denied. *Burton Marks* for petitioners on the motion. *Stanley Mosk*, Attorney General of California, and *Jack E. Goertzen*, Deputy Attorney General, for respondent, in opposition.

No. 482. LOCAL No. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS UNION, ET AL. *v.* PERKO. Certiorari, 371 U. S. 939, to the Supreme Court of Ohio; and

No. 541. LOCAL 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES, *v.* BORDEN. Certiorari, 371 U. S. 939, to the Court of Civil Appeals of Texas, Fifth Supreme Judicial District. The motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief, as *amicus curiae*, is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine* and *Thomas E. Harris* on the motion.

No. 839, Misc. WHITE *v.* CALIFORNIA;

No. 950, Misc. THREATT *v.* UNITED STATES; and

No. 994, Misc. MORTON *v.* GEORGIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1039, Misc. GRIECO *v.* LANGLOIS, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 993, Misc. IN RE WILSON; and

No. 1001, Misc. WALKER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of mandamus denied.

No. 1100, Misc. GREENHILL ET AL. *v.* RIVES ET AL., U. S. CIRCUIT JUDGES. Motion for leave to file petition for writ of mandamus denied. *Eugene Gressman, Dudley Yoedicke* and *Leon D. Hubert, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondents.

*Probable Jurisdiction Noted.*

No. 783. UNITED STATES *v.* HEALY ET AL. Appeal from the United States District Court for the Southern District of Florida. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. *R. E. Kunkel* for appellees.

*Certiorari Granted.* (*See also No. 1, Misc., ante, p. 705; No. 4, Misc., ante, p. 707; No. 17, Misc., ante, p. 706; No. 63, Misc., ante, p. 708; No. 70, Misc., ante, p. 710; No. 134, Misc., ante, p. 706; No. 301, Misc., ante, p. 711; No. 360, Misc., ante, p. 712; No. 444, Misc., ante, p. 707; No. 534, Misc., ante, p. 713; and No. 599, Misc., ante, p. 709.*)

No. 876. ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE *v.* OREGON STEVEDORING CO., INC. C. A. 9th Cir. Certiorari granted. *Erskine Wood* and *Erskine B. Wood* for petitioner. *Alfred A. Hampson* for respondent. Reported below: 310 F. 2d 481.

No. 585. DRESNER ET AL. *v.* CITY OF TALLAHASSEE. Circuit Court of Florida, Second Judicial Circuit. Certiorari granted. Counsel are directed to brief and argue, in addition to the merits, the question of whether the judgment is supported by adequate state grounds. *Tobias Simon* and *Howard W. Dixon* for petitioners. *James Messer, Jr.* and *Rivers Buford, Jr.* for respondent. Reported below: See 134 So. 2d 228.

No. 737. ALDRICH *v.* ALDRICH ET AL. Supreme Court of Appeals of West Virginia. Certiorari granted. *Herman D. Rollins* for petitioner. *Charles M. Love* for respondents. Reported below: 147 W. Va. —, 127 S. E. 2d 385.

Nos. 738 and 851. VAN DUSEN, U. S. DISTRICT JUDGE, ET AL. *v.* BARRACK, ADMINISTRATRIX, ET AL. C. A. 3d Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. *Owen B. Rhoads, George J. Miller, J. Welles Henderson, Jr.* and *Sidney L. Wickenhaver* for petitioners in No. 738. *Solicitor General Cox, Acting Assistant Attorney General Douglas, J. William Doolittle* and *Morton Hollander* for Van Dusen, petitioner in No. 851. *Elwood S. Levy, Abraham E. Freedman, Milton M. Borowsky, John R. McConnell, T. E. Byrne, Jr., Lee S. Kreindler* and *Abram P. Piwosky* for respondents. Reported below: 309 F. 2d 953.

No. 844. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, *v.* GREYHOUND CORPORATION. The motion of Amalgamated Association of Street, Electric Railway & Motor Coach Employes of America, AFL–CIO, for leave to file a brief, as *amicus curiae,* is granted. The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is also granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come, James C. Paras* and *Herman M. Levy* for petitioner. *Warren E. Hall, Jr.* for respondent. *I. J. Gromfine* and *Herman Sternstein* for Amalgamated Association of Street, Electric Railway & Motor Coach Employes of America, AFL–CIO, as *amicus curiae,* in support of the petition. *Alexander E. Wilson, Jr.* for Floors, Inc., as *amicus curiae,* in opposition. Reported below: 309 F. 2d 397.

*Certiorari Denied.* (*See also No. 781, ante, p. 703; No. 853, ante, p. 702; No. 854, ante, p. 709; No. 718, Misc., ante, p. 708; and No. 1039, Misc., supra.*)

No. 720. REES *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Eugene F. Mullin,*

*Jr., J. Parker Connor, S. White Rhyne, Jr., Walter L. Green* and *Charles A. Dukes, Jr.* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for respondent. Reported below: 203 Va. 850, 127 S. E. 2d 406.

No. 17. IDEAL FARMS, INC., ET AL. *v.* FREEMAN, SECRETARY OF AGRICULTURE. C. A. 3d Cir. Certiorari denied. *Willis F. Daniels, Harold W. Swope* and *Donn L. Snyder* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Mark R. Joelson* for respondent. Reported below: 288 F. 2d 608.

No. 765. PFEIFFER ELECTRIC CO. *v.* TEXAS. Court of Civil Appeals of Texas, Sixth Supreme Judicial District. Certiorari denied. *Henry L. Scott* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Joseph Jaworski,* Special Assistant Attorney General, for respondent. Reported below: 358 S. W. 2d 711.

No. 836. CHEMICAL CORP. OF AMERICA *v.* ANHEUSER-BUSCH, INC. C. A. 5th Cir. Certiorari denied. *Houston White* and *Beryl H. Weiner* for petitioner. *Owen J. Ooms, Roy A. Lieder* and *J. Lewis Hall* for respondent. Reported below: 306 F. 2d 433.

No. 838. CHARTER WIRE, INC., *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Rickard H. Lauritzen* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 309 F. 2d 878.

No. 839. FOX ET AL. *v.* NORTHERN ILLINOIS DEVELOPMENT CORP. C. A. 7th Cir. Certiorari denied. *Harold A. Smith* for petitioners. *Wayland B. Cedarquist* for respondent. Reported below: 309 F. 2d 882.

No. 837. WHITESIDE *v.* SLAVIN ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Ralph H. Clark* for respondents. Reported below: 309 F. 2d 322.

No. 840. SEIDLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harry Friedman* for petitioner. *Solicitor General Cox, Asssistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 310 F. 2d 739.

No. 847. ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Martin M. Nelson* for petitioner. *E. L. Ryan, Jr.* for respondent. Reported below: 311 F. 2d 493.

No. 848. ALBANESE ET AL. *v.* SACRAMENTO COUNTY BOARD OF EQUALIZATION ET AL. Supreme Court of California. Certiorari denied. *David G. McInnes* for petitioners.

No. 849. MOUSLEY ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *William Jay Leon* and *Lester J. Schaffer* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 311 F. 2d 795.

No. 852. TEITELBAUM FURS, INC., ET AL. *v.* AMERICAN HOME INSURANCE CO. ET AL. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioners. *Thomas P. Menzies* for respondents. Reported below: 58 Cal. 2d 601, 375 P. 2d 439.

No. 857. HARPER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Howard T. Savage* for petitioner. Reported below: 26 Ill. 2d 85, 185 N. E. 2d 865.

No. 856. JEFFERSON *v.* TAIYO KAIUN K. K. ET AL. C. A. 5th Cir. Certiorari denied. *Arthur J. Mandell* for petitioner. *William C. Harvin* for respondents. Reported below: 310 F. 2d 582.

No. 858. YACIMIENTOS PETROLIFEROS FISCALES *v.* PARAGON OIL CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Ralph Bosch* and *Charles A. Ellis* for petitioner. *David I. Gilchrist* and *Eli Ellis* for respondents. Reported below: 310 F. 2d 169.

No. 860. ILLINOIS PROTESTANT CHILDREN'S HOME *v.* DEPARTMENT OF PUBLIC WELFARE OF ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied. *William C. Burt, Selma M. Levine* and *Eugene A. Tappy* for petitioner. *William G. Clark,* Attorney General of Illinois, *William C. Wines* and *Raymond S. Sarnow,* Assistant Attorneys General, and *Phillip J. Murphy,* Special Assistant Attorney General, for respondents.

No. 865. COLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Evins* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 311 F. 2d 500.

No. 868. MELQUIST *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 26 Ill. 2d 22, 185 N. E. 2d 825.

No. 870. CONGREGATION OF SISTERS OF CHARITY OF THE INCARNATE WORD *v.* CITY OF SAN ANTONIO ET AL. Court of Civil Appeals of Texas, Tenth Supreme Judicial District. Certiorari denied. *Al M. Heck* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Carlos C. Cadena* and *Crawford B. Reeder* for respondents. Reported below: 360 S. W. 2d 580.

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No. 859. GREENHILL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Eugene Gressman, Dudley Yoedicke* and *Leon D. Hubert, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 869. SHELL OIL CO. *v.* MCKNIGHT ET AL. C. A. 5th Cir. Certiorari denied. *R. H. Whilden* for petitioner. *William M. Steger* for respondents. Reported below: 302 F. 2d 731.

No. 871. PROGRESS DEVELOPMENT CORP. *v.* DEERFIELD PARK DISTRICT. Supreme Court of Illinois. Certiorari denied. *Joseph L. Rauh, Jr., Eugene Gressman* and *John Silard* for petitioner. *Gerald C. Snyder* for respondent. Reported below: 26 Ill. 2d 296, 186 N. E. 2d 360.

No. 872. OCHS ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Joseph A. Maun* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Philip R. Miller* and *Cynthia Holcomb* for the United States. Reported below: — Ct. Cl. —, 305 F. 2d 844.

No. 829. SODERMAN *v.* U. S. CIVIL SERVICE COMMISSION. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent. Reported below: 313 F. 2d 694.

No. 38, Misc. PAXTON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Augustine A. Repetto* for respondent.

No. 920. SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION ET AL. *v.* TEXAS. Court of Civil Appeals of Texas, Sixth Supreme Judicial District. Certiorari denied. *Leroy Jeffers, Thomas C. Matthews, Jr., Thomas M. Phillips, William C. Harvin* and *W. Arthur Combs* for petitioners. *Waggoner Carr,* Attorney General of Texas, and *Joseph Jaworski,* Special Assistant Attorney General, for respondent. Reported below: 358 S. W. 2d 711.

No. 16, Misc. TENNISON *v.* DISTRICT COURT OF IOWA IN AND FOR LEE COUNTY. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se. Evan Hultman,* Attorney General of Iowa, for respondent.

No. 52, Misc. ATKINSON *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer* and *John E. Bush,* Assistant Attorneys General, for respondent.

No. 368, Misc. JONES *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 542, Misc. GILBERT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 307 F. 2d 322.

No. 768, Misc. DANIELSON *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Petitioner *pro se. Walter F. Mondale,* Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for respondent.

No. 638, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 113 U. S. App. D. C. 399, 308 F. 2d 652.

No. 662, Misc. CLAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 303 F. 2d 301.

No. 772, Misc. HOLT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 303 F. 2d 791.

No. 795, Misc. HANSEN *v.* WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied.

No. 828, Misc. BERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 309 F. 2d 311.

No. 834, Misc. SMARTT *v.* BOMAR, WARDEN. Supreme Court of Tennessee. Certiorari denied.

No. 862, Misc. DANTZLER *v.* DICTOGRAPH PRODUCTS, INC. C. A. 4th Cir. Certiorari denied. *Lewis B. Carpenter* for petitioner. *Leslie H. Arps* for respondent. Reported below: 309 F. 2d 326.

No. 853, Misc. THOMSON *v.* TUNKS, JUDGE, ET AL. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied.

No. 873, Misc. WELLS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 310 F. 2d 460.

No. 892, Misc. WILLIAMS *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 893, Misc. WHITE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 645, 184 A. 2d 840.

No. 894, Misc. CRESWELL *v.* DIRECTOR, PATUXENT INSTITUTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 639, 184 A. 2d 627.

No. 900, Misc. LEE *v.* WARDEN, MARYLAND PENITENTIARY. Circuit Court of Baltimore County, Maryland. Certiorari denied.

No. 903, Misc. MCKEITHAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 12 N. Y. 2d 718, 186 N. E. 2d 127.

No. 905, Misc. GRAY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 913, Misc. CHAFFIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 919, Misc. FRYSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 485, 184 A. 2d 709.

No. 914, Misc. BOYER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 921, Misc. LUPO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 925, Misc. COLEMAN *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 931, Misc. MADESEN *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 932, Misc. BALL *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 951, Misc. EDWARDS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1033, Misc. GRAVETTE *v.* REID, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

*Rehearing Denied.*

No. 717. LYNCHBURG TRAFFIC BUREAU *v.* SMITH'S TRANSFER CORP. OF STAUNTON, VIRGINIA, *ante*, p. 915;

No. 756. WHITING ET AL. *v.* UNITED STATES, *ante*, p. 935;

No. 822, Misc. OTTO *v.* LAUER, *ante*, p. 947; and

No. 845, Misc. OTTO *v.* SOMERS, MAYOR OF THE CITY OF DAYTON, OHIO, ET AL., *ante*, p. 948. Petitions for rehearing denied.

No. 256. In re Estate of Hurst, 371 U. S. 862, 931, *ante*, p. 925. Motion for leave to file a third petition for rehearing denied.

April 22, 1963.

*Miscellaneous Orders.*

No. 13, Original. Texas *v.* New Jersey et al. The motion of the State of Illinois for leave to intervene is denied. *William G. Clark*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, on the motion. [For earlier orders herein, see 369 U. S. 869; 370 U. S. 929; 371 U. S. 873; *ante*, p. 926.]

No. 529. United States *v.* Carlo Bianchi & Co., Inc. Certiorari, 371 U. S. 939, to the Court of Claims. The motion of the Bar Association of the District of Columbia for leave to file a brief, as *amicus curiae*, is granted. *Glen A. Wilkinson*, *Jesse E. Baskette* and *Paul M. Rhodes* on the motion.

No. 883. Statni Banka Ceskoslovenska *v.* Wolchok, Receiver. On petition for writ of certiorari to the Court of Appeals of New York. In this case the Solicitor General is invited to file a brief expressing the views of the United States.

No. 779, Misc. Sires *v.* Supreme Court of Washington. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way* and *Ralph Olson*, Assistant Attorneys General, for respondent.

No. 1185, Misc. Fulford *v.* Roberts, Chief Justice, et al. Motion for leave to file petition for writ of mandamus denied.

*Certiorari Granted.* (*See also No. 120, ante, p. 772; No. 2, Misc., ante, p. 773; No. 6, Misc., ante, p. 774; No. 8, Misc., ante, p. 775; No. 14, Misc., ante, p. 776; No. 15, Misc., ante, p. 766; No. 32, Misc., ante, p. 766; No. 37, Misc., ante, p. 770; No. 56, Misc., ante, p. 767; No. 61, Misc., ante, p. 777; No. 67, Misc., ante, p. 768; No. 74, Misc., ante, p. 768; No. 126, Misc., ante, p. 778; No. 219, Misc., ante, p. 779; No. 250, Misc., ante, p. 780; No. 516, Misc., ante, p. 781; No. 522, Misc., ante, p. 782; No. 575, Misc., ante, p. 769; No. 771, Misc., ante, p. 769; and No. 797, Misc., ante, p. 771.*)

No. 887. GREENE *v.* UNITED STATES. Court of Claims. Certiorari granted. *Eugene Gressman, George Kaufmann* and *Carl W. Berueffy* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——.

No. 790. UNITED STATES *v.* MERZ ET AL. C. A. 10th Cir. Certiorari granted. *Solicitor General Cox, Roger P. Marquis* and *Raymond N. Zagone* for the United States. *William J. Holloway, Jr.* for respondents. Reported below: 306 F. 2d 39.

No. 873. NATIONAL EQUIPMENT RENTAL, LTD., *v.* SZUKHENT ET AL. Motion of Bankers Trust Co. et al. for leave to file a brief, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *Wilbur G. Silverman* for petitioner. *David Hartfield, Jr., John D. Calhoun, Benjamin C. Milner III, Merrell E. Clark, Jr.* and *Henry L. King* for Bankers Trust Co. et al., as *amici curiae*, in support of the petition. Reported below: 311 F. 2d 79.

No. 850. 2,872.88 ACRES OF LAND ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *W. Lowrey Stone, Jesse G. Bowles* and *Forrest L. Champion, Jr.* for petitioners. *Solicitor General Cox* for the United States. Reported below: 310 F. 2d 775.

No. 882. COSTELLO *v.* IMMIGRATION AND NATURALIZATION SERVICE. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Question 1 presented by the petition which reads as follows:

"Whether the provision of § 241 (a)(4) of the Immigration and Nationality Act of 1952 for deportation of an 'alien . . . who at any time after entry is convicted of two crimes' applies to an individual who was a naturalized citizen when convicted."

MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

*Edward Bennett Williams* and *Harold Ungar* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 311 F. 2d 343.

*Certiorari Denied.* (*See also No. 896, Misc., ante, p. 770, and No. 983, Misc., ante, p. 771.*)

No. 886. SOUTH ATLANTIC & GULF COAST DISTRICT OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION INDEPENDENT ET AL. *v.* HARRIS COUNTY-HOUSTON SHIP CHANNEL NAVIGATION DISTRICT. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *Arthur J. Mandell* and *Sewell Myer* for petitioners. *L. G. Clinton, Jr.* for respondent. *Waggoner Carr,* Attorney General of Texas, and *Paul R. Robertson* and *Edward R. Moffett,* Assistant Attorneys General, for the State of Texas, as *amicus curiae,* in opposition. Reported below: 358 S. W. 2d 658; 360 S. W. 2d 181.

No. 744. HARRISBURG DAILY MARKET, INC., *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles Orlando Pratt* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondents. Reported below: 114 U. S. App. D. C. 26, 309 F. 2d 646.

No. 795. AMERICAN INSTITUTE FOR ECONOMIC RESEARCH, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Guy Emery* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Morton K. Rothschild* for the United States. Reported below: — Ct. Cl. —, 302 F. 2d 934.

No. 841. FIUMARA *v.* TEXACO, INC., ET AL. C. A. 3d Cir. Certiorari denied. *A. E. Hurshman* for petitioner. *Morris Duane, W. James MacIntosh, Jesse P. Luton, Jr.* and *Bynum E. Hinton, Jr.* for respondents. Reported below: 310 F. 2d 737.

No. 884. HELBROS WATCH CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox* and *James McI. Henderson* for respondent. Reported below: 114 U. S. App. D. C. 63, 310 F. 2d 868.

No. 885. PARKS ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. C. A. 4th Cir. Certiorari denied. *Melvin J. Sykes* for petitioners. *John Henry Lewin, Thomas X. Dunn, Louis Sherman, Robert R. Bair* and *George Cochran Doub* for respondents. Reported below: 314 F. 2d 886.

No. 889. MALOY *v.* BRISTOW ET AL. Supreme Court of Florida. Certiorari denied.

No. 891. MacNeil *v.* State Realty Co. of Boston, Inc. Land Court of Massachusetts. Certiorari denied. *Angus M. MacNeil*, petitioner, *pro se*. *Phillip Cowin* for respondent.

No. 892. O'Day Corporation *v.* Talman Corporation et al. C. A. 1st Cir. Certiorari denied. *Robert B. Russell* for petitioner. *William H. Edwards* for respondents. Reported below: 310 F. 2d 623.

No. 894. Toffenetti Restaurant Co., Inc., *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Morris Teitelbaum* and *Pauline Teitelbaum* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 311 F. 2d 219.

No. 897. Li Greci *v.* Greene, Tweed & Co. et al. Court of Appeals of New York. Certiorari denied. *Lucien J. Rossi* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Irving Galt*, Assistant Solicitor General, *Daniel Polansky*, Assistant Attorney General, and *Sheldon Raab*, Deputy Assistant Attorney General, for the Workmen's Compensation Board, respondent.

No. 899. Association of Maximum Service Telecasters, Inc., *v.* Federal Communications Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ernest W. Jennes, Edgar F. Czarra, Jr.* and *William H. Allen* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the Federal Communications Commission; *Edward P. Morgan* and *Herbert E. Forrest* for New Orleans Television Corp.; and *Aloysius B. McCabe* for Capitol Broadcasting Co., respondents.

No. 845. YOGURT MASTER, INC., *v.* WIRTZ, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *William H. Agnor* and *A. R. Surles, Jr.* for petitioner. *Solicitor General Cox, Charles Donahue, Bessie Margolin, Jacob I. Karro* and *Beate Bloch* for respondent. Reported below: 310 F. 2d 53.

No. 855. SIGLER, WARDEN, ET AL. *v.* WESTON. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Scallan E. Walsh, Teddy W. Airhart, Jr.* and *Dorothy W. Wolbrette,* Assistant Attorneys General, for petitioners. *Joel B. Dickinson* for respondent. Reported below: 308 F. 2d 946.

No. 875. DICKSON, WARDEN, *v.* BRUBAKER. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Stanley Mosk,* Attorney General of California, and *Robert R. Granucci* and *Albert W. Harris, Jr.,* Deputy Attorneys General, for petitioner. *Quentin Ogren* for respondent. Reported below: 310 F. 2d 30.

No. 898. DENNO, WARDEN, *v.* BLOETH. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Louis J. Lefkowitz,* Attorney General of New York, *Irving Rollins,* Assistant Attorney General, and *Charles T. Matthews* for petitioner. *Leon B. Polsky* for respondent. Reported below: 313 F. 2d 364.

No. 29, Misc. ALLEN *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se*. *Charles Nesbitt*, Attorney General of Oklahoma, and *Hugh H. Collum*, Assistant Attorney General, for respondent. Reported below: 368 P. 2d 667.

No. 451, Misc. COSEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 495, Misc. JOHNSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Assistant Attorney General, for respondent.

No. 713, Misc. KALLOS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Sherman L. Cohn* for the United States.

No. 736, Misc. FARRIOR *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 740, Misc. JOSEPH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 753, Misc. JOHNSON *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 310 F. 2d 349.

No. 767, Misc. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 803, Misc. STOCKS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 857, Misc. SPAMPINATO *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Leo A. Larkin, Seymour B. Quel* and *Fred Iscol* for the City of New York, respondent. Reported below: 311 F. 2d 439.

No. 865, Misc. SMALLWOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assisstant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 308 F. 2d 802.

No. 888, Misc. DIBLIN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 890, Misc. HINES *v.* PEPERSACK, WARDEN. Baltimore City Court of Baltimore, Maryland. Certiorari denied.

No. 909, Misc. HAMBY *v.* PATE, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 938, Misc. WEAVER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 935, Misc. WHITE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 940, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 955, Misc. TARPLEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 968, Misc. JONES *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1015, Misc. IN RE SNEBOLD. Supreme Court of California. Certiorari denied.

No. 1022, Misc. TAYLOR *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1046, Misc. WASHINGTON *v.* PEGELOW. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 796, Misc. BRAMBLE *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

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No. 743. STIRONE *v.* UNITED STATES, *ante*, p. 935. Petition for rehearing or in the alternative motion to remand denied.

No. 755, Misc. SHARROW *v.* UNITED STATES, *ante*, p. 949. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

No. 557, Misc. MILLER *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 918. Motion for leave to file a petition for rehearing denied.

APRIL 26, 1963.

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No. 866. MERRITT-CHAPMAN & SCOTT CORP. *v.* KENT, U. S. DISTRICT JUDGE. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Joseph F. Deeb* for petitioner.

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2. *District Courts—Suit challenging constitutionality of federal statute—Three-judge court.*—When no injunctive relief actually was contemplated or granted, 28 U. S. C. § 2282 did not require convening of three-judge court to hear and determine declaratory judgment action challenging constitutionality of a federal statute, even though complaint was amended so as to add prayer for injunctive relief. Kennedy v. Mendoza-Martinez, p. 144.

3. *District Courts—Suit challenging constitutionality of state statute—Three-judge court.*—In suit challenging constitutionality of state statute governing primary elections, a three-judge court was properly convened, as required by 28 U. S. C. § 2281. Gray v. Sanders, p. 368.

4. *District Courts—Standing to sue—Association of motor carriers.*—An association of motor carriers authorized under 49 U. S. C. § 5b was an appropriate representative of members aggrieved by order of Interstate Commerce Commission and had standing to challenge validity of Commission's order in Federal District Court. National Motor-Freight Assn. v. United States, p. 246.

5. *District Courts—Suit challenging constitutionality of state election system—Standing to sue.*—Qualified voter had standing to sue to redress illegal discrimination between rural and urban voters in statewide primary elections. Gray v. Sanders, p. 368.

6. *District Courts—Diversity of citizenship—Need for jury trial.*—In declaratory judgment action, brought in Federal District Court because of diversity of citizenship, to determine amount of fees owing

**PROCEDURE**—Continued.

to lawyer by client, federal law governs in determining whether plaintiff was entitled to jury trial; action was "legal" not "equitable" in character; and plaintiff was entitled to jury trial. Simler v. Conner, p. 221.

**RACIAL DISCRIMINATION.** See **Constitutional Law**, I, 1; V; VII.

**RAILROADS.** See **Employers' Liability Act**, 1–3; **Labor**, 3; **Transportation**, 1–3.

**RAILWAY LABOR ACT.** See **Constitutional Law**, I, 1; **Jurisdiction**, 3; **Labor**, 3.

**RECLAMATION.** See also **Jurisdiction**, 2.

*Federal reclamation projects—Right to take water by eminent domain—Preferential rights to project water—Authority and discretion to fix rates.*—Reclamation Act of 1902, § 8, does not mean that state law may prevent United States from taking water rights by eminent domain; City of Fresno has no preferential rights to water from Central Valley Reclamation Project; § 9 (c) of Reclamation Project Act of 1939 gives Secretary of Interior authority and discretion to fix rates for irrigation as well as water service; and officials of Reclamation Bureau acted within scope of authority. City of Fresno v. California, p. 627.

**REDRESS OF GRIEVANCES.** See **Constitutional Law**, VII.

**REMEDIES.** See **Jurisdiction**, 2; **Reclamation.**

**REORGANIZATIONS.** See **Bankruptcy.**

**RESTRAINT OF TRADE.** See **Antitrust Acts**, 1–2.

**RHODE ISLAND.** See **Constitutional Law**, VI.

**RIPARIAN RIGHTS.** See **Jurisdiction**, 2; **Reclamation.**

**ROBINSON-PATMAN ACT.** See **Antitrust Acts**, 1.

**SALES TAXES.** See **Taxation**, 4.

**SEAMEN.** See **Jurisdiction**, 1, 4; **Labor**, 1.

**SECRETARY OF INTERIOR.** See **Reclamation.**

**SELECTIVE TRAINING AND SERVICE ACT.** See **Constitutional Law**, III, 5; **Estoppel.**

**SHERMAN ACT.** See **Antitrust Acts**, 2.

**SIXTH AMENDMENT.** See **Constitutional Law**, III, 5.

**SOUTH CAROLINA.** See **Constitutional Law**, VII.

**STANDING TO SUE.** See **Procedure**, 4–5.

**SUMMARY JUDGMENTS.** See **Antitrust Acts**, 2.

**SUPREME COURT.** See **Procedure**, 1.

**TAXATION.**

1. *Income taxes—Deductions—Business expenses.*—Expenses of resisting wife's property claims in divorce litigation are not deductible under § 23 (a) (2) of Internal Revenue Code of 1939, as expenses "incurred . . . for the conservation . . . of property held for the production of income," when such claims stemmed entirely from marital relationship. United States v. Gilmore, p. 39.

2. *Income taxes—Deductions—Business expenses.*—Legal fees paid by taxpayer in connection with property settlements with wife incidental to divorce are not deductible under § 212 (2) of the Internal Revenue Code of 1954 as expenses "incurred . . . for the . . . conservation of property held for the production of income," when they arose entirely from marital relationship and not from any profit-seeking activity. United States v. Patrick, p. 53.

3. *Income tax—Accrual basis—Advance payments for dancing lessons.*—In exercise of discretion, Commissioner properly refused to accept accounting system on fiscal-year accrual basis which deferred to future years ratable portion of advance payments for dancing lessons to be given in future years. Schlude v. Commissioner, p. 128.

4. *State sales tax—Goods shipped out of State—Passage of title and delivery within State.*—Commerce Clause of Federal Constitution did not prevent Utah from levying and collecting sales tax on goods shipped out of State when passage of title and delivery of goods to purchaser took place within Utah. Utah Tax Comm'n v. Pacific States Pipe Co., p. 605.

**TEXAS.** See **Procedure**, 1.

**THREE-JUDGE COURTS.** See **Procedure**, 2–3.

**TOWBOATS.** See **Admiralty**, 2.

**TRADE ASSOCIATIONS.** See **Procedure**, 4.

**TRANSCRIPTS.** See **Constitutional Law**, IV, 3–4.

**TRANSPORTATION.** See also **Admiralty**, 1–2; **Employers' Liability Act**, 1–3; **Jurisdiction**, 3; **Labor**, 1–3; **Procedure**, 4.

1. *Railroads—Suspension of proposed rates—Expiration of 7-month period before decision by Commission — Injunction.* — By § 15 (7) of Interstate Commerce Act, Congress intended to vest in Commission exclusive power to suspend proposed rate changes, and

**TRANSPORTATION**—Continued.

it intended to withdraw from courts power to grant injunctive relief—even to barge lines and other parties who would be irreparably injured by proposed rates going into effect upon expiration of 7-month period without determination by Commission. Arrow Transportation Co. v. Southern R. Co., p. 658.

2. *Railroads—Rate reductions to meet rates of water carriers—Sufficiency of record to support cancellation.*—Purpose of § 15 (a) (3), added to Interstate Commerce Act by Transportation Act of 1958, was to permit railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed; reduction of rates for trailer-on-flatcar service to level of those of competing water carriers not illegal *per se;* record insufficient to sustain Commission in cancelling rates. Interstate Commerce Commission v. New York, N. H. & H. R. Co., p. 744.

3. *Railroads—Discontinuance of trains—"Operated wholly within . . . a single State."*—When a railroad which operated passenger trains solely within a single State, and had discontinued most of them with permission of State Commission, filed with Interstate Commerce Commission notice of its intention to discontinue all passenger service, the proceeding was governed by § 13a (2) of the Interstate Commerce Act, and it was properly dismissed by Interstate Commerce Commission for want of initial jurisdiction. New Jersey v. New York, S. & W. R. Co., p. 1.

**TRIAL.** See **Constitutional Law,** II.

**TRUCK MANUFACTURERS.** See **Antitrust Acts,** 2.

**TRUSTEES.** See **Bankruptcy.**

**TRUTH SERUM.** See **Constitutional Law,** III, 1.

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**USURY.** See **Jurisdiction,** 5.

**UTAH.** See **Constitutional Law,** I, 2.

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**WATER CARRIERS.** See **Admiralty,** 1–2; **Transportation,** 1–2.

**WATER RIGHTS.** See **Jurisdiction,** 2; **Reclamation.**

**WORDS.**

1. *"Affecting commerce."*—National Labor Relations Act. McCulloch v. Sociedad Nacional, p. 10; Incres Steamship Co. v. International Maritime Workers, p. 24.

2. *"Business expenses."*—Internal Revenue Code of 1939, § 23 (a) (2); Internal Revenue Code of 1954, § 212 (a). United States v. Gilmore, p. 39; United States v. Patrick, p. 53.

3. *"Commerce."*—National Labor Relations Act. McCulloch v. Sociedad Nacional, p. 10; Incres Steamship Co. v. International Maritime Workers, p. 24.

4. *"Exclusive, and in place, of all other liability of the United States."*—Federal Employees' Compensation Act, § 7 (b). Weyerhaeuser S. S. Co. v. United States, p. 597.

5. *"Fiduciary."*—Bankruptcy Act, § 249. Wolf v. Weinstein, p. 633.

6. *"Incurred . . . for the . . . conservation of property held for the production of income."*—Internal Revenue Code of 1939, § 23 (a) (2); Internal Revenue Code of 1954, § 212 (2). United States v. Gilmore, p. 39; United States v. Patrick, p. 53.

7. *"Operated wholly within the boundaries of a single State."*—Interstate Commerce Act, § 13a (2). New Jersey v. New York, S. & W. R. Co., p. 1.

8. *"Production and gathering."*—Natural Gas Act, § 1 (b). Northern Natural Gas Co. v. Kansas Corporation Comm'n, p. 84.

9. *"Unreasonably low prices for the purpose of destroying competition or eliminating a competitor."*—Robinson-Patman Act, § 3. United States v. National Dairy Products Corp., p. 29.

**WORKMEN'S COMPENSATION.** See **Admiralty**, 1; **Employers' Liability Act**, 1–3.

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